REPORT
OF THE
INTERNATIONAL LAW
COMMISSION

on the work of its forty-third session

---

29 April – 19 July 1991

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTY-SIXTH SESSION

SUPPLEMENT No. 10 (A/46/10)

UNITED NATIONS

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CHAPTER I

INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-third session at its permanent seat at the United Nations Office at Geneva, from 29 April to 19 July 1991. The session was opened by the Chairman of the forty-second session, Mr. Jiuyong Shi.

A. Membership

2. The Commission consists of the following members:

Prince Bola Adesumbo AJIBOLA (Nigeria)
Mr. Husain AL-BAHARNA (Bahrain)
Mr. Awn AL-KHASAWNEH (Jordan)
Mr. Riyadh AL-QAYSI (Iraq)
Mr. Gaetano ARANGIO-RUIZ (Italy)
Mr. Julio BARBOZA (Argentina)
Mr. Juri G. BARSEGOV (Union of Soviet Socialist Republics)
Mr. John Alan BEESLEY (Canada)
Mr. Mohamed BENNOUNA (Morocco)
Mr. Boutros BOUTROS-GHALI (Egypt)
Mr. Carlos CALERO-RODRIGUES (Brazil)
Mr. Leonardo DIAZ-GONZALEZ (Venezuela)
Mr. Gudmundur EIRIKSSON (Iceland)
Mr. Laurel B. FRANCIS (Jamaica)
Mr. Bernhard GRAEFRATH (Germany)
Mr. Francis Mahon HAYES (Ireland)
Mr. Jorge E. ILLUECA (Panama)
Mr. Andreas J. JACOVIDES (Cyprus)
Mr. Abdul G. KOROMA (Sierra Leone)
Mr. Ahmed MAHIOU (Algeria)
Mr. Stephen C. McCAFFREY (United States of America)
Mr. Frank X. NJENGA (Kenya)
Mr. Motoo OGISO (Japan)
Mr. Stanislaw PAWLAK (Poland)

Mr. Alain PELLET (France)
Mr. Pemmaraju SREENIVASA RAO (India)
Mr. Edilbert RAZAFINDRALAMBO (Madagascar)
Mr. Emmanuel J. ROUCOUNAS (Greece)
Mr. César SEPULVEDA-GUTIERREZ (Mexico)
Mr. Jiuyong SHI (China)
Mr. Luis SOLARI TUDELA (Peru)
Mr. Doudou THIAM (Senegal)
Mr. Christian TOMUSCHAT (Germany)
Mr. Alexander YANKOV (Bulgaria)

B. Officers

3. At its 2205th and 2206th meetings on 29 and 30 April 1991, the Commission elected the following officers:

Chairman:	Mr. Abdul G. Koroma
First Vice-Chairman:	Mr. John Alan Beesley
Second Vice-Chairman:	Mr. César Sepúlveda-Gutiérrez
Chairman of the Drafting Committee:	Mr. Stanislaw Pawlak
Rapporteur:	Mr. Husain Al-Baharna

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2222nd meeting on 11 June 1991, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to the Enlarged Bureau. The Planning Group was composed of the following members:

1/ Namely, Mr. Laurel B. Francis, Mr. Doudou Thiam, Mr. Alexander Yankov, Mr. Stephen C. McCaffrey, Mr. Leonardo Díaz-González, Mr. Bernhard Graefrath and Mr. Jiuyong Shi.

2/ Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Leonardo Díaz-González, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso and Mr. Doudou Thiam.

Mr. John Alan Beesley (Chairman), Prince Bola Adesumbo Ajibola,
Mr. Awn Al-Khasawneh, Mr. Riyadh Al-Qaysi, Mr. Gaetano Arangio-Ruiz,
Mr. Julio Barboza, Mr. Leonardo Díaz-González, Mr. Laurel B. Francis,
Mr. Bernhard Graefrath, Mr. Jorge E. Illueca, Mr. Andreas J. Jacovides,
Mr. Ahmed Mahiou, Mr. Frank X. Njenga, Mr. Stanislaw Pawlak,
Mr. Emmanuel J. Roucounas, Mr. Christian Tomuschat.

The Group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

5. At its 2205th and 2206th meetings, on 29 and 30 April 1991, the Commission appointed a Drafting Committee which was composed of the following members:

Mr. Stanislaw Pawlak (Chairman), Mr. Husain Al-Baharna,
Mr. Awn Al-Khasawneh, Mr. Juri G. Barsegov, Mr. Mohamed Bennouna,
Mr. Carlos Calero-Rodrigues, Mr. Gudmundur Eiriksson,
Mr. Francis Mahon Hayes, Mr. Abdul G. Koroma, Mr. Stephen C. McCaffrey,
Mr. Motoo Ogiso, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao,
Mr. Edilbert Razafindralambo, Mr. César Sepúlveda-Gutierrez,
Mr. Jiuyong Shi and Mr. Luis Solari Tudela.

D. Secretariat

6. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Vladimir S. Kotliar, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Jacqueline Dauchy, Deputy Director of the Codification Division of the Office of Legal Affairs, acted as Deputy Secretary to the Commission. Ms. Sachiko Kuwabara and Mr. Manuel Rama-Montaldo, Senior Legal Officers, served as Senior Assistant Secretaries to the Commission and Ms. Mahnoush H. Arsanjani and Mr. Mpazi Sinjela, Legal Officers, served as Assistant Secretaries to the Commission.

E. Agenda

7. At its 2205th meeting, on 29 April 1991, the Commission adopted an agenda for its forty-third session, consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Jurisdictional immunities of States and their property.
4. Draft Code of Crimes against the Peace and Security of Mankind.
5. The law of the non-navigational uses of international watercourses.
6. International liability for injurious consequences arising out of acts not prohibited by international law.
7. Relations between States and international organizations (second part of the topic).
8. Programme, procedures and working methods of the Commission, and its documentation.
9. Cooperation with other bodies.
10. Date and place of the forty-fourth session.
11. Other business.

8. The Commission considered all the items on its agenda. The Commission held 48 public meetings (2205th to 2252nd) and, in addition, the Drafting Committee of the Commission held 55 meetings, the Enlarged Bureau of the Commission held 2 meetings and the Planning Group of the Enlarged Bureau held 6 meetings.

F. General description of the work of the Commission at its forty-third session

9. At its forty-third session, the Commission achieved major progress on three topics on its agenda. It concluded the consideration of the topic "Jurisdictional immunities of States and their property" by finally adopting a set of draft articles on the topic. In addition, the Commission provisionally adopted complete sets of draft articles on two other topics on its agenda, namely "Draft Code of Crimes against the Peace and Security of Mankind" and "The law of the non-navigational uses of international watercourses". It is to be recalled that at its forty-first session the Commission finally adopted draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols thereto. Thus, during the current term of office of its members, the Commission achieved the specific goals which it had set for itself at the beginning of that term of office.

10. As regards the topic "Jurisdictional immunities of States and their property", the Commission on the basis of the recommendations of the Drafting Committee, 3/ adopted on second reading, as indicated in paragraph 9 above, a complete set of draft articles on the topic. It decided, in accordance with article 23 of its Statute, to recommend to the General Assembly that it should convene an international conference of plenipotentiaries to consider the draft articles and to conclude a convention on the subject. 4/

11. As regards the topic "The law of the non-navigational uses of international watercourses", the Commission, as indicated in paragraph 9 above, adopted on first reading a complete set of draft articles on the topic. It decided, in accordance with articles 16 and 21 of the Statute of the Commission that the draft should be transmitted, through the Secretary-General, to Governments for their comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1993. In a first phase of its work, the Commission had considered the seventh report of the Special Rapporteur, Mr. Stephen C. McCaffrey (A/CN.4/436 and Corr.1 to 3), which contained in particular a draft article entitled "Use of terms". 5/ The Commission agreed to refer that draft article to the Drafting Committee. At a subsequent stage, the Commission, on the basis of recommendations of the Drafting Committee, 6/ provisionally adopted articles 2 (Use of terms), 10 (Relationship between uses), 26 (Management), 27 (Regulation), 28 (Installations), 29 (International watercourses in time of armed conflict) and 32 (Non-discrimination). Also on the basis of recommendations of the Drafting Committee, the Commission adopted revised versions of articles provisionally adopted at previous sessions. 7/

3/ The recommendations of the Drafting Committee were examined at the 2218th to 2221st meetings, held between 4 and 7 June 1991.

4/ See Chapter II below.

5/ The report was examined at the 2215th to 2218th meetings held between 24 May and 4 June 1991.

6/ The recommendations of the Drafting Committee were considered at the 2228th to 2231st meetings, held between 21 June and 27 June 1991.

7/ See Chapter III below.

12. With respect to the topic "Draft Code of Crimes against the Peace and Security of Mankind", the Commission, as indicated in paragraph 9 above, adopted on first reading a complete set of draft articles on the topic. It decided in accordance with articles 16 and 21 of the Statute of the Commission that the draft should be transmitted, through the Secretary-General, to Governments for their comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1993. In a first phase of its work, the Commission had considered the ninth report of the Special Rapporteur, Mr. Doudou Thiam (A/CN.4/435 and Add.1 and Corr.1), which contained inter alia a draft article on applicable penalties. 8/ The Commission decided to refer that draft article to the Drafting Committee. At a subsequent stage, the Commission, on the basis of recommendations of the Drafting Committee, 9/ provisionally adopted: (i) articles 3 (Responsibility and punishment), 4 (Motives) and 5 (Responsibility of States) corresponding to article 3 as initially adopted; (ii) articles 11 (Order of a Government or superior) and 14 (Defences and extenuating circumstances); (iii) articles 19 (Genocide), 20 (Apartheid), 21 (Systematic or mass violations of human rights), 22 (War crimes) and 26 (Wilful and severe damage to the environment). Also on the basis of recommendations of the Drafting Committee, the Commission adopted revised versions of articles provisionally adopted at previous sessions. 10/

13. The topic "International liability for injurious consequences arising out of acts not prohibited by international law" was considered by the Commission

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8/ The report was examined at the 2207th to 2214th meetings held between 14 and 24 May 1991.

9/ The recommendations of the Drafting Committee were examined at the 2236th to 2241st meetings held between 5 and 12 July 1991.

10/ See Chapter IV below.

on the basis of the seventh report of the Special Rapporteur, Mr. Julio Barboza (A/CN.4/L.437 and Corr.1). 11/ The report contained a re-examination of the principal issues of the topic in order to identify areas of agreement in the Commission and facilitate work on the topic. 12/

14. The topic "Relations between States and international organizations (second part of the topic)" was considered by the Commission on the basis of the fifth and sixth reports of the Special Rapporteur, Mr. Leonardo Díaz-González. 13/ The fifth report (A/CN.4/438 and Corr.1) *inter alia* contained five draft articles, namely article 12 (on archives) and articles 13 to 16 (on publications and communication facilities). The sixth report (A/CN.4/439) contained five draft articles, namely articles 18 to 22 (on fiscal immunity and exemptions from customs duties). The Commission agreed to refer all the articles to the Drafting Committee. 14/

15. On the topic "State responsibility", the Commission heard the presentation by the Special Rapporteur, Mr. Arangio-Ruiz, of his third report (A/CN.4/440 and Add.1). 15/ The report was not discussed for lack of time. 16/

16. Matters relating to the programme, procedures and working methods of the Commission and its documentation were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant recommendations of the Commission are to be found in the last chapter of the report which also deals with cooperation with other bodies and with certain administrative and other matters.

11/ This topic was considered at the 2221st to 2228th meetings, held between 7 and 21 June 1991.

12/ See Chapter V below.

13/ The topic was examined at the 2232nd to 2236th meetings, held between 27 June and 5 July 1991.

14/ See Chapter VI below.

15/ The report was introduced at the 2238th meeting, held on 10 July 1991.

16/ See Chapter VII below.

CHAPTER II

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

17. The topic "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by the decision of the Commission at its thirtieth session, in 1978, 17/ on the recommendation of a Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

18. At its thirty-first session, in 1979, the Commission had before it the preliminary report of the Special Rapporteur, Mr. Sompong Sucharitkul. The Commission decided at the same session that a questionnaire should be circulated to States Members of the United Nations to obtain further information and the views of Governments. The materials received in response to the questionnaire were submitted to the Commission at its thirty-third session, in 1981. From its thirty-second session (1980) to its thirty-eighth session (1986) the Commission received seven further reports from the Special Rapporteur. 18/

19. At its thirty-eighth session the Commission adopted on first reading an entire set of draft articles on the topic, 19/ which was transmitted, in accordance with articles 16 and 21 of the Commission's Statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.

17/ *Yearbook ... 1978*, vol. II (Part Two), pp. 152-155, paras. 179-190.

18/ For these seven further reports (the second through eighth reports) of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357; *Yearbook ... 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1; *Yearbook ... 1984*, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2; *Yearbook ... 1985*, vol. II (Part One), p. 21, document A/CN.4/388; *Yearbook ... 1986*, vol. II (Part One), pp. 8-22, document A/CN.4/396.

19/ *Yearbook ... 1986*, vol. II (Part Two), pp. 7-22.

20. At its thirty-ninth session (1987), the Commission appointed Mr. Motoo Ogiso, Special Rapporteur for the topic. At its fortieth session (1988), the Commission had before it replies which had been received from Member States and Switzerland. 20/ The Commission also received a preliminary report from the Special Rapporteur. 21/

21. At its forty-first session (1989), the Commission had before it the second report of the Special Rapporteur, 22/ as well as the preliminary report submitted to its fortieth session, for the purpose of conducting the second reading of the draft articles. After discussion of these reports and comments and observations of Governments, the Commission decided to refer draft articles 1 to 11 *bis* to the Drafting Committee, together with the proposals made by the Special Rapporteur, as well as those made by some members in plenary during the discussion. 23/

22. At its forty-second session (1990), the Commission had before it the third report of the Special Rapporteur 24/ on the basis of which the Commission resumed its consideration of draft articles 12 to 28, including the title of Part III. Having completed their consideration, the Commission decided to refer those articles to the Drafting Committee, together with the proposals of the Special Rapporteur as well as those submitted in the Plenary. 25/

23. The Drafting Committee began its work on the second reading of the draft articles at the forty-second session of the Commission 26/ and completed its work at the present forty-third session. The report of the

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20/ A/CN.4/410 and Add.1 and Corr.1 to Add.5.

21/ A/CN.4/415 and Corr.1 and 2.

22/ A/CN.4/422 and Corr.1 and A/CN.4/422/Add.1 and Corr.1.

23/ See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10), para. 405.

24/ A/CN.4/431 and Corr.1.

25/ See *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10* (A/45/10), para. 166.

26/ Ibid., para. 167.

Drafting Committee was presented by its Chairman [27] and discussed at the 2218th to 2221st meetings, together with the report of the Drafting Committee on its work at the previous session which had been introduced by the former Chairman of the Drafting Committee. [28] On the basis of those reports, the Commission adopted the final text of a set of 22 draft articles on the jurisdictional immunities of States and their property. In accordance with its Statute, the Commission submits them herewith to the General Assembly, together with a recommendation (see para. 25 below).

24. Some members raised the question of State-owned or State-operated aircraft engaged in commercial service as well as the question of space objects. The Commission, while recognizing the importance of the question, felt that it called for more time and study.

B. Recommendation of the Commission

25. At its 2235th meeting, on 4 July 1991, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that it convene an international conference of plenipotentiaries to examine the draft articles on the jurisdictional immunities of States and their property and to conclude a convention on the subject.

26. The Commission was of the view that the question of the settlement of disputes on which draft articles were proposed by the former Special Rapporteur [29] could be dealt with by the above-mentioned international conference, if it considers that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles.

C. Tribute to the Special Rapporteur, Mr. Motoo Ogiso

27. At its 2221st meeting, on 7 June 1991, the Commission, after adopting the text of the articles on jurisdictional immunities of States and their property, adopted the following resolution by acclamation:

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[27] See A/CN.4/SR.2218-2221.

[28] The report was presented at the 2183rd meeting of the Commission at its forty-second session. See A/CN.4/SR.2183.

[29] Articles 29 to 33 and the Annex dealing with the settlement of disputes, which were proposed by the former Special Rapporteur but not discussed, are reproduced in the Report of the Commission on the work of its forty-first session (Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10 (A/44/10), para. 611).

"The International Law Commission,

"Having adopted the draft articles on jurisdictional immunities of States and their property,

"Wishes to express to the Special Rapporteur, Mr. Motoo Ogiso, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of draft articles on jurisdictional immunities of States and their property."

D. Draft articles on jurisdictional immunities of States and their property

28. The text of, and the commentaries to, draft articles 1 to 22, as finally adopted by the Commission at its forty-third session are reproduced below.

DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

PART I

INTRODUCTION

Article 1

Scope of the present articles

The present articles apply to the immunity of a State and its property from the jurisdiction of the courts of another State.

Commentary

(1) The purpose of the present articles is to formulate rules of international law on the topic of jurisdictional immunities of States and their property.

(2) Article 1 indicates the subject matter to which the articles should apply. In any given situation in which the question of State immunity may arise, a few basic notions or concepts appear to be inevitable. In the first place, the main character of the present draft articles is "jurisdictional immunities". The expression "jurisdictional immunities" in this context is used not only in relation to the right of sovereign States to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system of the territorial State, but also in relation to the non-exercise of all other administrative and executive powers,

by whatever measures or procedures and by whatever authorities of the territorial State in relation to a judicial proceeding. The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgements and execution of the judgements thus rendered or their suspension and further exemption. It should be stated further that the scope of the articles covers not only the question of immunities of a State from adjudication before the court of another State but also that of immunity of a State in respect of property from measures of constraint, such as attachment and execution in connection with a proceeding before a court of another State, as provided in Part IV. Secondly, the existence of two independent sovereign States is a prerequisite to the question of jurisdictional immunities, namely, a foreign State and a State of the forum. The draft articles generally refer to "a State" and "another State" but it has been found useful to use "forum State" and "State of the forum" in certain articles for the sake of clarity. A definition of the term "State" for the purpose of the present articles is found in article 2.

(3) The phrase "of the courts" in the present text is designed to confirm the understanding that the scope of the current topic is confined primarily to immunity from the jurisdiction "of the courts" of States. A definition of the term "court" is found in article 2.

Article 2

Use of terms

1. For the purposes of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(b) "State" means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State;

(iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(v) representatives of the State acting in that capacity;

(c) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Commentary

Paragraph 1

(1) The present article combines original articles 2 and 3 provisionally adopted on first reading, taking into account the suggestion which was proposed and supported by members of the Commission as well as delegations in the Sixth Committee.

Paragraph 1 (a)

(2) A definition of the term "court" was deemed necessary in connection with article 1. In the context of the present articles, any organ of a State empowered to exercise judicial functions is a court, regardless of the level and whatever nomenclature is used. Although the draft articles do not define the term "proceeding", it should be understood that they do not cover criminal proceedings.

(3) With regard to the term "judicial functions", it should be noted that such functions vary under different constitutional and legal systems. For this reason, the Commission decided not to include a definition of the term "judicial functions" in the present article. The scope of judicial functions, however, should be understood to cover such functions whether exercised by courts or by administrative organs. Judicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the development of a legal proceeding, or at the final stage of enforcement of judgements. Such judicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to, a legal proceeding. Although judicial functions are determined by the internal organizational structure of each State, the term does not, for the purposes of the present articles, cover the administration of justice in all its aspects which, at least under certain legal systems, might include other functions related to the appointment of judges.

(4) It should be noted also that this definition may, under different constitutional and legal systems, cover the exercise of the power to order or adopt enforcement measures (sometimes called "quasi-judicial functions") by specific administrative organs of the State.

Paragraph 1 (b)

(5) In view of different jurisprudential approaches to the meaning of "State" in the context of jurisdictional immunities, it was considered useful to spell out the special meaning of the term for the purposes of the present articles. The general terms used in describing "State" should not imply that the provision is an open-ended formula. The term "State" should be understood in the light of its object and purpose, namely to identify those entities or persons entitled to invoke the immunity of the State where a State can claim immunity and also to identify certain subdivisions or instrumentalities of a State that are entitled to invoke immunity when performing acts in the exercise of sovereign authority. Accordingly, in the context of the present

articles, the expression "State" should be understood as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity.

Paragraph 1 (b) (i)

(6) The first category includes the State itself, acting in its own name and through its various organs of government, however designated, such as the sovereign or head of State, the head of government, the central Government, various ministries and departments of government, ministerial or sub-ministerial departments, offices or bureaux, as well as subordinate organs and missions representing the State, including diplomatic missions and consular posts, permanent missions and delegations. The use of the expression "various organs of government" is intended to include all branches of government and is not limited to the executive branch only.

(7) The expression "State" includes fully sovereign and independent foreign States, and also, by extension, entities that are sometimes not really foreign and at other times not fully independent or only partially sovereign. 30/

30/ The practice of some States appears to support the view that semi-sovereign States and even colonial dependencies are treated, although they may fall within the same constitutional grouping as the State itself, as foreign sovereign States. British courts, for instance, consistently declined jurisdiction in actions against States members of the British Commonwealth and semi-sovereign States dependent on the United Kingdom. Thus, the Maharajah of Baroda was regarded as "a sovereign prince over whom British courts have no jurisdiction" Gaekwar of Baroda State Railways v. Hafiz Habid-ul-Haq (1938) (Annual Digest ..., 1938-1940 (London), vol. 9 (1942), case No. 78, p. 233). United States courts have adopted the same view with regard to their own dependencies: Kawananakoa v. Polybank (1907) (United States Reports, vol. 205 (1921), pp. 349 and 353), wherein the territory of Hawaii was granted sovereign immunity; and also, by virtue of the federal Constitution, with respect to member States of the Union: Principality of Monaco v. Mississippi (1934) (Annual Digest ..., 1933-1934 (London), vol. 7 (1940), case No. 61, p. 166; cf. G.H. Hackworth, Digest of International Law (Washington, D.C., U.S. Government Printing Office, 1941), vol. II, p. 402). More recently, in Morgan Guaranty Trust Co. v. Republic of Palau (639 F. Supp. 706. U.S. District Court, S.D.N.Y., 10 July 1986. The American Journal of International Law, vol. 81, p. 220 (1987)) the court held that Palau was a "foreign State" for purposes of the United States Foreign Sovereign Immunities Act based on the de facto degree of sovereignty exercised by Palau, even though the Compact of Free Association had not been ratified and the termination of the United Nations Trusteeship Agreement designating Palau as a "strategic trust" had not been approved by the Security Council. French courts have similarly upheld immunity in cases concerning semi-sovereign States and member States

Certainly the cloak of State immunity covers all foreign States regardless of their form of government, whether a kingdom, empire or republic, a federal union, a confederation of States or otherwise. 31/

(8) A sovereign or a head of State, in his public capacity as a principal organ of a State, is also entitled to immunity to the same extent as the State itself, on the ground that the crown, the reigning monarch, the sovereign head of State or indeed a head of State may be equated with the central Government.

(9) A State is generally represented by the Government in most, if not all of its international relations and transactions. Therefore a proceeding against the Government eo nomine is not distinguishable from a direct action against

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within the French Union: Bey of Tunis et consorts v. Ahmed-ben-Aïad (1893) (Dalloz, Recueil périodique et critique de jurisprudence, 1894 (Paris), part 2, p. 421); see also cases concerning the "Gouvernement chérifien", for instance, Laurans v. Gouvernement impérial chérifien et Société marseillaise de credit (1934) (Revue critique de droit international (Darras) (Paris), vol. 30, No. 4 (October-December 1935), p. 795, and a note by Mme S. Basdevant-Bastid, pp. 796 et seq.). See also Duff Development Company Ltd. v. Government of Kelantan and another (1924) (United Kingdom, The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1924, p. 797). See, however, Marine Steel Ltd. v. Government of the Marshall Islands (1981) (2 NZLR. High Court of New Zealand, 29 July 1981. The American Journal of International Law, vol. 77, p. 158 (1983)), where the High Court of New Zealand held that United Nations Trust Territories, such as the Marshall Islands, have not yet achieved the status of a sovereign State and, therefore, are not entitled to sovereign immunity.

31/ See, for instance, Dralle v. Republic of Czechoslovakia (1950) (International Law Reports, 1950 (London), vol. 17 (1956), case No. 41, p. 155); Etat espagnol v. Canal (1951) Journal du droit international (Clunet) (Paris), 79th year, No. 1 (January-March 1952), p. 220); Patterson-MacDonald Shipbuilding Co., McLean v. Commonwealth of Australia (1923) (United States of America, The Federal Reporter, vol. 293 (1924), p. 192); De Froe v. The Russian State, now styled "The Union of Soviet Socialist Republics" (1932) (Annual Digest ..., 1931-1932 (London), vol. 6 (1938), case No. 87, p. 170); Irish Free State v. Guaranty Safe Deposit Company (1927) (Annual Digest ..., 1925-1926 (London), vol. 3 (1929), case No. 77, p. 100); Kingdom of Norway v. Federal Sugar Refining Co. (1923) (United States of America, The Federal Reporter, vol. 286 (1923), p. 188); Ipitrade International S.A. v. Federal Republic of Nigeria (1978) (id., Federal Supplement, vol. 465 (1979), p. 824); 40 D 6262 Realty Corporation and 40 E 6262 Realty Corporation v. United Arab Emirates Government (1978) (ibid., vol. 447 (1978), p. 710); Kahan v. Pakistan Federation (1951) (United Kingdom, The Law Reports, King's Bench Division, 1951, vol. II, p. 1003); Vienna v. Democratic Republic of the Congo (1968) (Canada, The Dominion Law Reports, Third series, vol. 5, p. 128).

the State. 32/ State practice has long recognized the practical effect of a suit against a foreign Government as identical with a proceeding against the State. 33/

(10) Just as the State is represented by its Government, which is identified with it for most practical purposes, the Government is often composed of State organs and departments or ministries that act on its behalf. Such organs of State and departments of government can be, and are often constituted as, separate legal entities within the internal legal system of the State. Lacking as they do international legal personality as a sovereign entity, they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact constitute integral parts thereof. Such State organs or departments of government comprise the various ministries of a Government, 34/ including the armed forces, 35/ the subordinate

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32/ See, for example, Lakhowsky v. Swiss Federal Government and Colonel de Reynier (1921) (Annual Digest ..., 1919-1922 (London), vol. 1, case No. 83, p. 122); U. Kyaw Din v. His Britannic Majesty's Government of the United Kingdom and the Union of Burma (1948) (Annual Digest ..., 1948 (London), vol. 15 (1953), case No. 42, p. 137); Etienne v. Government of the Netherlands (1947) (Annual Digest ..., 1947 (London), vol. 14, case No. 30, p. 83).

33/ Sovereign immunity has sometimes been accorded to colonial dependencies of foreign States on the ground that the actions in effect impleaded the foreign Governments, States being identifiable with their Governments. See, for instance, The "Martin Behrman", Isbrandtsen Co. v. Netherlands East Indies Government (1947) (Annual Digest ..., 1947 (London), vol. 14 (1951), case No. 26, p. 75); Van Heyningen v. Netherlands Indies Government (1948) (Annual Digest ..., 1948 (London), vol. 15 (1953), case No. 43, p. 138).

34/ See, for instance, Bainbridge v. The Postmaster General (1905) (United Kingdom, The Law Reports, King's Bench Division, 1906, vol. I, p. 178); Henon v. Egyptian Government and British Admiralty (1947) (Annual Digest ..., 1947 (London), vol. 14 (1951), case No. 28, p. 78); Triandafilou v. Ministère public (1942) (The American Journal of International Law (Washington, D.C.), vol. 39, No. 2 (April 1945), p. 345); Piascik v. British Ministry of War Transport (1943) (Annual Digest ..., 1943-1945 (London), vol. 12 (1949), case No. 22, p. 87); and Turkish Purchases Commission case (1920) (Annual Digest ..., 1919-1922 (London), vol. 1 (1932), case No. 77, p. 114).

35/ See, for example, the opinion of Chief Justice Marshall in The Schooner "Exchange" v. McFaddon (1812) (W. Cranch, Reports of Cases Argued and Adjudged in the Supreme Court of the United States, 3rd ed. (New York, Banks Law Publishing, 1911), vol. VII, pp. 135-137). See also various Status of Forces Agreements and Foreign Visiting Forces Acts.

divisions or departments within each ministry, such as embassies, 36/ special missions 37/ and consular posts 38/ and offices, commissions, or councils 39/ which need not form part of any ministry but are themselves autonomous State organs answerable to the central Government or to one of its departments, or administered by the central Government. Other principal organs of the State such as the legislature and the judiciary of a foreign State would be equally identifiable with the State itself if an action were or could be instituted against them in respect of their public or official acts.

Paragraph 1 (b) (ii)

(11) The second category covers the constituent units of a federal State. Constituent units of a federal State are regarded as a State for purposes of the present draft articles. No special provision for federal States appeared in the text of original article 3, paragraph 1, containing the definition of "State" as provisionally adopted on first reading. The Commission, taking into account the views expressed by some members of the Commission as well as Governments, agreed to introduce this provision on second reading. In some federal systems, constituent units are distinguishable from the political subdivisions referred to in paragraph 1 (b) (iii) in the sense that these units are, for historical or other reasons, to be accorded the same immunities as those of the State, without the additional requirement that

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36/ Embassies are subsidiary organs of the State, being part of the Ministry of Foreign Affairs or the Foreign Office of the sending State. Their status is governed by the 1961 Vienna Convention on Diplomatic Relations.

37/ Special missions are also covered by State immunity as contained in the 1969 Convention on Special Missions. See also the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

38/ See the 1963 Vienna Convention on Consular Relations.

39/ See, for example, Mackenzie-Kennedy v. Air Council (1927) (United Kingdom, The Law Reports, King's Bench Division, 1927, vol. II, p. 517); Graham and others v. His Majesty's Commissioners of Public Works and Buildings (1901) (ibid., 1901, vol. II, p. 781); Société Viajes v. Office national du tourisme espagnol (1936) (Annual Digest ..., 1935-1937 (London), vol. 8 (1941), case No. 87, p. 227); Telkes v. Hungarian National Museum, No. II (1942) (Annual Digest ..., 1941-1942 (London), vol. 10 (1945), case No. 169, p. 576).

they perform acts in the exercise of the sovereign authority of the State. Paragraph 1 (b) (ii) was introduced with this particular situation in mind. However, State practice has not been uniform on this question. 40/ In some

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40/ See, for example, *Sullivan v. State of Sao Paulo* (1941) (*Annual Digest ..., 1941-1942* (London), vol. 10 (1945), case No. 50, p. 178), where the United States State Department had recognized the claim of immunity. In that case, Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States; Judge Learned Hand expressed his doubts whether every political subdivision of a foreign State was immune which exercised substantial governmental power. See also *Yale Law Journal* (New Haven, Conn.), vol. 50, No. 6 (April 1941), pp. 1088 *et seq.*; *Cornell Law Quarterly Review* (Ithaca, N.Y.), vol. 26 (1940-1941), pp. 720 *et seq.*; *Harvard Law Review* (Cambridge, Mass.), vol. LV, No. 1 (November 1941), p. 149; *Michigan Law Review* (Ann Arbor, Mich.), vol. 40, No. 6 (April 1942), pp. 911 *et seq.*; *Southern California Law Review* (Los Angeles, Calif.), vol. 15 (1941-1942), p. 258. This was the most commented case of that time. See also *Hans v. Louisiana* (1890) (*United States Reports*, vol. 134 (1910), p.1; *South Dakota v. North Carolina* (1904) (ibid., vol. 192 (1911), p. 286; *United States v. North Carolina* (1890) (ibid., vol. 136 (1910), p. 211; *Rhode Island v. Massachusetts* (1846) (B.C. Howard, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, 2nd ed., vol. IV (1909), p. 591); and cases cited above in notes 30 and 32.

See, however, the practice of France, for example, in *Etat de Ceará v. Dorr et autres* (1932) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1933 (Paris), part 1, p. 196). The Court said:

> "Whereas this rule [of incompetence] is to be applied only when invoked by an entity which shows itself to have a personality of its own in its relations with other countries, considered from the point of view of public international law; whereas such is not the case of the State of Ceará, which, according to the provisions of the Brazilian Constitution legitimately relied upon by the lower courts, and whatever its internal status in the sovereign confederation of the United States of Brazil of which it is a part, being deprived of diplomatic representation abroad, does not enjoy from the point of view of international political relations a personality of its own ..." (ibid., p. 197).

See also *Dumont v. State of Amazonas* (1948) (*Annual Digest ..., 1948* (London), vol. 15, case No. 44, p. 140). For Italy, see *Somigii v. Etat de Sao Paulo du Brésil* (1910) (*Revue de droit international privé et de droit pénal international* (Darras) (Paris), vol. VI (1910), p. 527), where Sao Paulo was held amenable to Italian jurisdiction in respect of a contract to promote immigration to Brazil. For Belgium, see *Feldman v. Etat de Bahia* (1907) (*Pasicrisie belge, 1908* (Brussels), vol. II, p. 55 or *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 484), where Bahia was denied immunity although under the Brazilian Constitution it was regarded as a sovereign State. See also the other federal systems they are not distinguishable from political subdivisions, as they are accorded the jurisdictional immunities of the federal State only to the extent that they perform acts in the exercise of "sovereign authority". This uncertain status of constituent units of a State is preserved by the European Convention on State Immunity, 1972. 41/ Therefore, it depends upon the constitutional practice or historical background of a particular federal State whether its constituent units are treated as a State under this paragraph or under paragraph 1 (b) (iii) below.

Paragraph 1 (b) (iii)

(12) The third category covers subdivisions of a State which are entitled, under internal law, to perform acts in the exercise of the sovereign authority of the State. The corresponding term for "sovereign authority" used in the French text is "prérogatives de la puissance publique". The Commission discussed at length whether in the English text "sovereign authority" or "governmental authority" should be used and has come to the conclusion that "sovereign authority" seems to be, in this case, the nearest equivalent to

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case, in the United States, Molina v. Comision Reguladora del Mercado de Henequén (1918) (Hackworth, op. cit., vol. II, pp. 402-403), where Yucatán, a member State of the United States of Mexico, was held amenable to the jurisdiction of the United States courts; and in Australia, Commonwealth of Australia v. New South Wales (1923) (Annual Digest ..., 1923-1924 (London), vol. 2 (1933), case No. 67, p. 161). The Court said:

> "The appellation 'sovereign State' as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning".

41/ See Council of Europe, European Convention on State Immunity and Additional Protocol, European Treaty Series, No. 74 (Strasbourg, 1972). The Convention came into force on 11 June 1976 between Austria, Belgium and Cyprus and has since been ratified by the United Kingdom, Switzerland and the Netherlands, Luxembourg and Germany. Article 28, paragraph 1, confirms non-enjoyment of immunity by the constituent states of a federal State, but paragraph 2 permits the federal State to make a declaration that its constituent states may invoke the provisions of the Convention. The Protocol came into effect on 22 May 1985 between Austria, Belgium, Cyprus, the Netherlands and Switzerland, and has since been ratified by Luxembourg. The European Tribunal in matters of State immunity was established on 28 May 1985 pursuant to the Protocol.

"prérogatives de la puissance publique". 42/ Some members, on the other hand, expressed the view that the term "sovereign authority" was normally associated with the international personality of the State, in accordance with international law, which was not the subject of the paragraph. Consequently it was held that "governmental authority" was a better English translation of the French expression "la puissance publique". Autonomous regions of a State which are entitled, under internal law, to perform acts in the exercise of sovereign authority may also invoke sovereign immunity under this category.

(13) Whatever the status of a subdivision of a State, there is nothing to preclude the possibility of such entities being constituted or authorized under internal law to act as organs of the central Government or as State agencies performing sovereign acts of the foreign State. 43/ It is not difficult to envisage circumstances in which such subdivisions may in fact be exercising sovereign authority assigned to them by the State. There are cases

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42/ The view was expressed by some members that the expression "prérogatives de la puissance publique de l'Etat" in the French text, and the expression "sovereign authority of the State" in the English text, were not equivalent in meaning and could lead to different interpretations. The French expression appears to be intended to refer to public institutions and to distinguish them from private institutions. Thus not all types of "prérogatives de la puissance publique" are related to the sovereignty of a State, and the view of those members was that the expression "sovereign authority of the State" in the English text was too restrictive. In this connection, it was noted that the term "government" or "government authority" was used in Part I of the draft articles on State responsibility on which the Commission had taken the view that the term was the correct translation of "prérogative de la puissance publique" in the French text of the draft articles. It was suggested, therefore, that the term should be interpreted as "government authority", or "State authority", which is the term in fact used in the Russian text of the present draft article.

43/ This possibility was pointed out by Pillet, commenting on a French case denying immunity. Ville de Genève v. Consorts de Civry (1894) (Sirey, Recueil géneral des lois et des arrêts, 1896, (Paris), part 1, pp. 225 et seq.). See also Rousse et Maber v. Banque d'Espagne (1937) (ibid., 1938, part 2, p. 17), where the Court of Appeal of Poitiers envisaged the same possibility; Rousseau, in his note (ibid., pp. 17-23), thought that provincial autonomies such as the Basque Government might at the same time be "an executive organ of a decentralized administrative unit". Compare the English Court of Appeal in Kahan v. Pakistan Federation (1951) (see note 31 above). See also Huttinger v. Upper Congo-Great African Lakes Railways Co. et al. (1934) (Annual Digest ..., 1933-1934 (London), vol. 7, case No. 65, pp. 172-173), and the cases cited in note 33 above.

where, dictated by expediency, the courts have refrained from entertaining suits against such autonomous entities, holding them to be an integral part of the foreign Government. 44/

Paragraph 1 (b) (iv)

(14) The fourth category embraces the agencies or instrumentalities of the State and other entities, including private entities, but only to the extent that they are entitled to perform acts in the exercise of "prérogative de la puissance publique". Beyond or outside the sphere of acts performed by them in the exercise of the sovereign authority of the State, they do not enjoy any jurisdictional immunity. Thus, in the case of an agency or instrumentality or other entity which is entitled to perform acts in the exercise of sovereign authority as well as acts of a private nature, immunity may be invoked only in respect of the acts performed in the exercise of sovereign authority.

(15) The reference to "other entities" has been added on second reading and is intended to cover non-governmental entities when in exceptional cases endowed with governmental authority. It takes into account the practice which was resorted to relatively often after the Second World War and still, to some extent, in recent times, in which a State entrusts a private entity with certain governmental authority to perform acts in the exercise of the sovereign authority of the State. Examples may be found in the practice of certain commercial banks which are entrusted by a Government to deal also with import and export licensing which is exclusively within governmental powers. Therefore, when private entities perform such governmental functions, to that extent, they should be considered a "State" for the purposes of the present articles. One member, however, expressed doubts as to whether the examples cited were common enough to warrant the inclusion of the reference. Another

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44/ In Van Heyningen v. Netherlands Indies Government (1948) (see note 33 above), the Supreme Court of Queensland (Australia) granted immunity to the Netherlands Indies Government. Judge Philip said:

> "In my view, an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court." (op. cit., p. 140).

member noted that in the present context the term "prérogative de la puissance publique" clearly means "government authority". 45/ The concept of "agencies or instrumentalities of the State or other entities" could theoretically include State enterprises or other entities established by the State performing commercial transactions. For the purpose of the present articles, however, such State enterprises or other entities are presumed not to be entitled to perform governmental functions, and accordingly, as a rule, are not entitled to invoke immunity from jurisdiction of the courts of another State (see art. 10, para. 3).

(16) There is in practice no hard-and-fast line to be drawn between agencies or instrumentalities of a State and departments of government. The expression "agencies or instrumentalities" 46/ indicates the interchangeability of the two terms. 47/ Proceedings against an agency of a

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45/ See also, note 41 above.

46/ See, for example, the United States of America Foreign Sovereign Immunities Act of 1976 (United States Code, 1976 Edition, vol. 8, title 28, chap. 97 (text reproduced in United Nations, Materials on jurisdictional immunities of States and their property (United Nations publication, Sales No. E/F.81.V.10, hereafter cited as Materials on jurisdictional immunities ...), pp. 55 et seq.)), which, in sect. 1603 (b), defines "agency or instrumentality of a foreign State" as an entity "(1) which is a separate legal person, (2) which is an organ of a foreign State or political division thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof, and (3) which is neither a citizen or a State of the United States as defined in section 1332 (c) and (d) of this title nor created under the laws of any third country."

47/ See, for example, Krajina v. The Tass Agency and another (1949) (Annual Digest ..., 1949 (London), vol. 16 (1955), case No. 37, p. 129); compare Compañía Mercantil Argentina v. United States Shipping Board (1924) (Annual Digest ..., 1923-1924 (London), vol. 2 (1933), case No. 73, p. 138), and Baccus S.R.L. v. Servicio Nacional del Trigo (1956) (United Kingdom, The Law Reports, Queen's Bench Division, 1957, vol. 1, p. 438), in which Lord Justice Jenkins observed:

> "Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery." (ibid., p. 466)

foreign Government 48/ or an instrumentality of a foreign State, whether or not incorporated as a separate entity, could be considered to be a proceeding against the foreign State, particularly when the cause of action relates to the activities conducted by the agency or instrumentality of a State in the exercise of sovereign authority of that State. 49/

Paragraph 1 (b) (v)

(17) The fifth and last category of beneficiaries of State immunity encompasses all the natural persons who are authorized to represent the State in all its manifestations, as comprehended in the first four categories mentioned in paragraphs 1 (b) (i) to (iv). Thus, sovereigns and heads of State in their public capacity would be included under this category as well as in the first category, being in the broader sense organs of the Government of the State. Other representatives include heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular

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48/ For a different view, see the opinions of Lord Justices Cohen and Tucker in Krajina v. The Tass Agency (1949) (see note 47 above), and in Baccus S.R.L. v. Servicio Nacional del Trigo (1956) (see note 47 above), where Lord Justice Parker said:

> "I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State." (op. cit., p. 472)

See also Emergency Fleet Corporation, United States Shipping Board v. Western Union Telegraph Company (1928) (United States Reports, vol. 275 (1928), p. 415):

> "Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." (ibid., pp. 425-426)

See, however, the certificate of the United States Ambassador regarding the status of the U.S. Shipping Board in the case Compañía Mercantil Argentina (1924) (cited in note 47 above).

49/ See Dollfus Mieg et Cie v. Bank of England (1950) and United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England - Gold Bars case (1952) (Annual Digest ..., 1949 (London), vol. 16 (1955), case No. 36, p. 103); and Monopole des tabacs de Turquie et al. v. co-intéressée des tabacs de Turquie (1930) (Annual Digest ..., 1929-1930 (London), vol. 5 (1935), case No. 79, p. 123).

officers, in their representative capacity. [50] The reference at the end of paragraph 1 (b) (v) to "in that capacity" is intended to clarify that such immunities are accorded to their representative capacity "ratione materiae".

(18) It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities. [51] Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune ratione materiae. Such immunities characterized as ratione materiae are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity. State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities, being immunity ratione materiae. [52]

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[50] The fact that the immunities enjoyed by representatives of government, whatever their specialized qualifications, diplomatic or consular or otherwise, are in the ultimate analysis State immunities has never been doubted. Rather, it has been unduly overlooked. Recently, however, evidence of their connection is reflected in some of the replies and information furnished by Governments. The Jamaican legislation and the Moroccan decision on diplomatic immunities and Mauritian law on consular immunities are outstanding reminders of the closeness of identities between State immunities and other types of immunities traceable to the State.

[51] See, for example, Thai-Europe Tapioca Service v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies (1975) (Weekly Law Reports, vol. 1, p. 1485).

[52] Immunities ratione materiae may outlive the tenure of office of the representatives of a foreign State. They are nevertheless subject to the qualifications and exceptions to which State immunities are ordinarily subject in the practice of States. See, for instance, Carlo d'Austria v. Nobili (1921) (Annual Digest ..., 1919-1922 (London), vol. 1 (1932), case No. 90, p. 136) and La Mercantile v. Regno de Grecia (1955) (International Law Reports, 1955 (London), vol. 22 (1958), p. 240), where the contract concluded by the Greek Ambassador for the delivery of raw materials was imputable to the State, and subject to the local jurisdiction.

(19) Of all the immunities enjoyed by representatives of Government and State agents, two types of beneficiaries of State immunities deserve special attention, namely, the immunities of personal sovereigns and those of ambassadors and diplomatic agents. 53/ Apart from immunities ratione materiae by reason of the activities or the official functions of representatives, personal sovereigns and ambassadors are entitled, to some extent in their own right, to immunities ratione personae in respect of their persons or activities that are personal to them and unconnected with official functions. The immunities ratione personae, unlike immunities ratione materiae which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated. All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts. 54/ Indeed, even such immunities inure not to the personal benefit of sovereigns and ambassadors but to the benefit of the States they represent, to enable them to fulfil their representative functions or for the effective performance of

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53/ Historically speaking, immunities of sovereigns and ambassadors developed even prior to State immunities. They are in State practice regulated by different sets of principles of international law. The view has been expressed that, in strict theory, all jurisdictional immunities are traceable to the basic norm of State sovereignty. See S. Sucharitkul, State Immunities and Trading Activities in International Law (London, Stevens, 1959), chaps. 1 and 2; E. Suy, "Les bénéficiaires de l'immunité de l'Etat", L'immunité de juridiction et d'exécution des Etats, Actes du colloque conjoint des 30 et 31 janvier 1969 des Centres de droit international (Brussels, Editions de l'Institut de sociologie, 1971), pp. 257 et seq.

54/ Thus in The Empire v. Chang and Others (1921) (Annual Digest ..., 1919-1922 (London), vol. 1, case No. 205, p. 288), the Supreme Court of Japan confirmed the conviction of former employees of the Chinese legation in respect of offences committed during their employment as attendants there, but unconnected with their official duties. See also Léon v. Díaz (1892) (Journal du droit international privé (Clunet) (Paris), vol. 19, p. 1137), concerning a former Minister of Uruguay in France, and Laperdrix et Penquer v. Kouzouooff et Belin (1926) (ibid., vol. 53 (January-February 1926), pp. 64-65), where an ex-secretary of the United States Embassy was ordered to pay an indemnity for injury in a car accident.

their official duties. 55/ This proposition is further reflected, in the case of diplomatic agents, in the rule that diplomatic immunities can only be waived by an authorized representative of the sending State and with proper governmental authorization. 56/

Paragraph 1 (c)

(20) The expression "commercial transaction" calls for a definition in order to list the types of contracts or transactions which are intended to fall within its scope. The term "commercial contract", which was adopted on first reading for the original draft article 2, paragraph 1, subparagraph (b), was

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55/ See, for example, the judgement of the Court of Geneva in the case V. ... et Dicker v. D ... (1927) (ibid., vol. 54 (January-February 1927, p. 1179), where an action by a mother and newly born child was allowed to proceed against an ex-diplomat. Commenting on the decision Nöel-Henry said:

> "... the real basis of immunity is the necessity of the function. Consequently, the principle is that the diplomat is covered by immunity only when he is fulfilling his functions ... When he has relinquished his post, he can be sued, except in connection with acts performed by him in the fulfilment of his functions; moreover, it is not so much the immunity of the diplomat that is involved as the immunity of the Government which he represents." (ibid., p. 1184)

See also M. Brandon, "Report on diplomatic immunity by an Interdepartmental Committee on State immunities", International and Comparative Law Quarterly (London), vol. 1 (July 1952), p. 358; P. Fiore, Trattato di diritto internazionale pubblico, 3rd ed. rev. (Turin, Unione tipografico-editrice, 1887-1891), p. 331, para. 491.

56/ See, for instance, Dessus v. Ricoy (1907) (Journal du droit international privé (Clunet) (Paris), vol. 34 (1907), p. 1086), where the Court said:

> "... since the immunity of diplomatic agents is not personal to them, but is an attribute and a guarantee of the State they represent ... the agent cannot waive his immunity, especially when he cannot produce in support of a waiver of immunity any permission to do so issued by his Government."

See also Reichenbach et Cie v. Mme Ricoy (1906) (ibid., p. 111); Cottenet et Cie v. Dame Raffalowich (1908) (ibid., vol. 36 (1909), p. 150); the Grey case (1953) (ibid., vol. 80 (1953), p. 886); and Procureur général près la Cour de cassation v. S.E. le Docteur Franco-Franco (1954) (ibid., vol. 81, No. 1 (1954), p. 786). See also the provisions of the 1961 Vienna Convention on Diplomatic Relations.

replaced by the term "commercial transaction" in response to the preference for that change expressed by some members of the Commission and some delegations in the Sixth Committee. 57/ As will be discussed below, the term "transaction" is generally understood to have a wider meaning than the term "contract", including non-contractual activities such as business negotiations. The term "transaction" presents, however, some difficulties of translation into other official languages, owing to the existence of different terminologies in use in different legal systems. It is to be observed that "commercial transaction", as referred to in paragraph 2 (a) of article 10, namely, transactions between States and those on a government-to-government basis, are excluded from the application of paragraph 1 of that article. For such transactions, State immunity subsists and continues to apply. Some members considered that the use of the term "commercial" in the definition should be avoided as being tautological and circular. The Commission considered this question in some detail on second reading and sought an alternative wording which would eliminate the term "commercial" at least in paragraphs 1 (c) (i) and (iii), but was unable to find an appropriate formulation. In the view of one member, profit-making was the most important criterion for the determination of the commercial character of a contract or transaction, and should have been incorporated in the definition of "commercial transaction".

(21) For the purposes of the draft articles, the expression "commercial transaction" covers three categories of transactions. In the first place, it covers all kinds of commercial contracts or transactions for the sale of goods or supply of services.

(22) Secondly, the expression "commercial transaction" also covers inter alia a contract for a loan or other transaction of a financial nature, such as commercial loans or credits or bonds floated in the money market of another State. A State is often required not only to raise a loan in its own name,

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57/ The term "commercial transaction" is in fact used in several national legislations. See, for example, United Kingdom State Immunity Act of 1978 (sect. 3 (3)); Singapore State Immunity Act of 1979 (sect. 5 (3)); Pakistan State Immunity Ordinance of 1981 (sect. 5 (3)); South Africa Foreign States Immunities Act of 1981 (sect. 4 (3)); Australia Foreign States Immunities Act of 1985 (sect. 11 (3)).

but sometimes also to provide a guarantee or surety for one of its national enterprises in regard to a purchase, say, of civil or commercial aircraft, which is in turn financed by foreign banks or a consortium of financial institutions. Such an undertaking may be given by a State in the form of a contract of guarantee embodying an obligation of guarantee for the repayment or settlement of the loan taken by one of its enterprises and to make payment in the event of default by the co-contractor, or an obligation of indemnity to be paid for the loss incurred by a party to the principal contract for a loan or a transaction of a financial nature. The difference between an obligation of guarantee and one of indemnity may consist in the relative directness or readiness of available remedies in relation to non-performance or non-fulfilment of contractual obligations by one of the original parties to the principal contract. An obligation of indemnity could also be described in terms of willingness or readiness to reimburse one of the original parties for the expense or losses incurred as a result of the failure of another party to honour its contractual commitments with or without consequential right of subrogation. The Commission reworded the text of subparagraph (ii) slightly on second reading to take account of the fact that an obligation of guarantee could exist not only in the case of a loan, but also in other agreements of a financial nature. The same thing applies to indemnity as well. The Commission therefore combined the reference to the obligation of guarantee and that to the obligation of indemnity so that they apply both to the contracts for a loan and to other agreements of a financial nature.

(23) Thirdly, the expression "commercial transaction" also covers other types of contracts or transactions of a commercial, industrial, trading or professional nature, thus taking in a wide variety of fields of State activities, especially manufacturing, and possibly investment, as well as other transactions. "Contracts of employment" are excluded from this definition since they form the subject of a separate rule, as will emerge from the examination of draft article 11.

(24) Examples of the various types of transactions categorized as commercial transactions are abundant, as illustrated in the commentary to article 10.

Paragraph 2

(25) In order to provide guidance for determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), two tests are suggested to be applied successively. In the first place, reference should be

made primarily to the nature of the contract or transaction. If it is established that it is non-commercial or governmental in nature, there would be no necessity to enquire further as to its purpose.

(26) However, if after the application of the "nature" test, the contract or transaction appears to be commercial, then it is open to the defendant State to contest this finding by reference to the purpose of the contract or transaction if in its practice, that purpose is relevant to determining the non-commercial character of the contract or transaction. This two-pronged approach, which provides for the consideration not only of the nature, but in some instances also of the purpose of the contract or transaction, is designed to provide an adequate safeguard and protection for developing countries, especially in their endeavours to promote national economic development. Defendant States should be given an opportunity to prove that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by raison d'Etat, such as the procurement of food supplies to feed a population, relieve a famine situation or revitalize a vulnerable area, or supply medicaments to combat a spreading epidemic, provided that it is the practice of that State to conclude such contracts or transactions for such public ends. It should be noted however that it is the competent court, and not the defendant State, which determines in each case the commercial or non-commercial character of a contract or transaction taking into account the practice of the defendant States. Some delegations in the Sixth Committee as well as members of the Commission stated that they would have preferred to exclude the reference to the purpose test which, in their view, was liable to subjective interpretation.

(27) Controversies have loomed large in the practice of States, as can be seen from the survey of State practice contained in the commentary to article 10. 58/ Paragraph 2 of article 2 is aimed at reducing unnecessary

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58/ See the commentary to article 10 below, paras. 13-18. In a recent decision, a United States court held that the commercial or non-commercial character of a contract must be determined on the basis of the essential character of the agreement and not on the basis of auxiliary terms that are designed to facilitate the performance of the contract. See Practical Concepts, Inc. v. Republic of Bolivia. 811 F.2d, p. 1543. U.S. Court of Appeals, D.C. Cir., 17 February 1987. The American Journal of International Law, vol. 81, p. 952 (1987).

controversies arising from the application of a single test, such as the nature of the contract or transaction, which is initially a useful test, but not by any means a conclusive one in all cases. This provision is therefore designed to provide a supplementary standard for determining, in certain cases, whether a particular contract or transaction is "commercial" or "non-commercial". The "purpose" test should not therefore be disregarded totally. 59/ A balanced approach is thus ensured by the possibility of reference, as appropriate, to the criterion of the purpose, as well as that of the nature, of the contract or transaction. 60/

59/ For example, in the "Parlement belge" case (1879) (United Kingdom, The Law Reports, Probate Division, 1879, vol. IV, p. 129), Sir Robert Phillimore, after reviewing English and American cases, considered the Parlement belge itself as being neither a ship of war nor a vessel of pleasure and thus not entitled to immunity. This decision was reversed by the Court of Appeal (1880) (ibid., 1880, vol. V, p. 197; see Lord Justice Brett (ibid., p. 203). See also Gouvernement espagnol v. Casaux (1849) (Dalloz, Recueil périodique et critique de jurisprudence, 1849 (Paris), part 1, p. 9), concerning the purchase of boots by the Spanish Government for the Spanish army. Cf. Hanukiew v. Ministère de l'Afghanistan (1933) (Annual Digest and Reports of Public International Law Cases (1933-1934) (London), vol. 7 (1940), case No. 66, pp. 174-175), concerning a contract for the purchase of arms; and various loan cases, such as the Moroccan Loan, Laurans v. Gouvernement impérial chérifien (1934) (Sirey, Recueil général des lois et des arrêts, 1935 (Paris), part 1, p. 103). See also Vavasseur v. Krupp (1898) (United Kingdom, The Law Reports, Chancery Division, vol. IX (1978), p. 351); Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria (1977) (The All England Law Reports, 1977, vol. I, p. 881), concerning an order for cement for the construction of barracks in Nigeria. Cf. Gugenheim v. State of Viet Nam (1961) (Revue générale de droit international public (Paris), vol. 66 (1962), p. 654; reproduced in United Nations, Materials on Jurisdictional Immunities ..., p. 257), a case concerning a contract for the purchase of cigarettes for the Vietnamese national army. Other cases relevant in the present context include: Egyptian Delta Rice Mills Co. v. Comisaría General de Abastecimientos y Transportes de Madrid (1943) (Annual Digest ..., 1943-1945 (London), vol. 12 (1949), case No. 27, pp. 103-104), cited by S. Sucharitkul, Recueil des course de l'Académie de droit international de La Haye, 1976-I, vol. 149 (Leiden, Sijthoff, 1977), p. 138; Khan v. Fredson Travel Inc., (1982) (133 D.L.R. (3d), p. 632. Ontario High Court. Canadian Yearbook of International Law, vol. XXI, p. 376 (1983)); X v. Empire of ... (Entscheidungen des Bundesverfassungsgericht) (Tübingen), vol. 16 (1964), p. 27; English trans. in United Nations, Materials on Jursidictional Immunities ..., pp. 282 et seq.).

60/ This is of crucial significance in view of the emerging trend in the judicial practice and legislation of some States. See the commentary to article 10 below, paras. 13-17.

(28) What is said above applies equally to a contract for the sale of goods or the supply of services or to other types of commercial transactions as defined in article 2, paragraph 1 (c). For instance, a contract of loan to make such a purchase or a contract of guarantee for such a loan could be non-commercial in character, having regard ultimately also to the public purpose for which the contract of purchase was concluded. For example, a contract of guarantee for a loan to purchase food supplies to relieve famine would usually be non-commercial in character because of its presumably public purpose.

Paragraph 3

(29) Paragraph 3 is designed to confine the use of terms in paragraphs 1 and 2, namely "court", "State" and "commercial transaction", to the context of jurisdictional immunities of States and their property. Clearly, these terms may have different meanings in other international instruments, such as multilateral conventions or bilateral agreements, or in the internal law of any State in respect of other legal relationships. It is thus a signal to States which ratify or accede or adhere to the present articles, that they may do so without having to amend their internal law regarding other matters, because the three terms used have been given specific meaning in the current context only. These definitions are without prejudice to other meanings already given or to be given to these terms in the internal law of States or in international instruments. It should be observed nevertheless that for the States parties to the present articles, the meanings ascribed to those terms by article 2, paragraphs 1 and 2, would have to be followed in all questions relating to jurisdictional immunities of States and their property under the present articles.

(30) Although paragraph 3 confines itself to the terms defined in paragraphs 1 and 2, it applies also to other expressions used in the present draft articles but which are not specifically defined. This understanding is necessary in order to maintain the autonomous character of the articles.

Article 3

Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present articles are likewise without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*.

Commentary

(1) Article 3 was originally conceived as a signpost to preclude the possibility of overlapping between the present articles and certain existing conventions dealing with the status, privileges, immunities and facilities of specific categories of representatives of Governments. It was originally drafted as a one-paragraph article concerning existing régimes of diplomatic and consular immunities which should continue to apply unaffected by the present articles. Historically, diplomatic immunities under customary international law were the first to be considered ripe for codification, as indeed they have been in the Vienna Convention on Diplomatic Relations, 1961. [61] Another classic example of immunities enjoyed under customary international law is furnished by the immunity of sovereigns or other heads of State. A provision indicating that the present draft articles are without prejudice to these immunities appears as paragraph 2 of article 3. Both paragraphs are intended to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the present articles. In order to conform to this understanding and to align the text of paragraph 1 to that of paragraph 2, the phrase "under international law" has been added to the text of paragraph 1 as adopted provisionally on first reading.

Paragraph 1

(2) Paragraph 1, in its original version, contained specific references to the various international instruments with varying degrees of adherence and ratification. Mention was made of the following missions and persons representing States:

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[61] United Nations, *Treaty Series*, vol. 500, p. 95; see also the various bilateral consular agreements.

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961;

(ii) consular missions under the Vienna Convention on Consular Relations of 1963; 62/

(iii) special missions under the Convention on Special Missions of 1969; 63/

(iv) representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975; 64/

(v) permanent missions or delegations and observer delegations of States to international organizations or their organs in general; 65/

(vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973. 66/

(3) Article 3 has since been revised and is now appropriately entitled, "Privileges and immunities not affected by the present articles". A general reference is preferred without any specific enumeration of missions governed by existing international instruments whose status in multilateral relations is far from uniform. Paragraph 1 deals with the following two categories:

(i) diplomatic, consular or special missions as well as missions to international organizations or delegations to organs of international organizations or to international conferences;

(ii) persons connected with such missions.

The extent of privileges and immunities enjoyed by a State in relation to the exercise of the functions of the entities referred to in subparagraph 1 (a) is

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62/ Ibid., vol. 596, p. 261.

63/ General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

64/ United Nations, Juridical Yearbook 1975 (United Nations publication, Sales No. E.77.V.3), p. 87.

65/ See, e.g. the Convention on the Privileges and Immunities of the United Nations, 1946, United Nations, Treaty Series, vol. 1, p. 15, and the Convention on the Privileges and Immunities of the Specialized Agencies, ibid., vol. 33, p. 261, as well as other regional conventions.

66/ See ibid., vol. 1035, p. 167.

determined by the provisions of the relevant international conventions referred to in paragraph (2) above, where applicable, or by general international law. The Commission had, in this connection, added the words "under international law" after the words "enjoyed by a State". This addition established the necessary parallel between paragraphs 1 and 2. The expression "persons connected with them [missions]" is to be construed similarly.

(4) The expressions "missions" and "delegations" also include permanent observer missions and observer delegations within the meaning of the Vienna Convention on Representation of States in Their Relations with International Organizations of a Universal Character of 1975.

(5) The article is intended to leave existing special régimes unaffected, especially with regard to persons connected with the missions listed. Their immunities may also be regarded, in the ultimate analysis, as State immunity, since the immunities enjoyed by them belong to the State and can be waived at any time by the State or States concerned.

Paragraph 2

(6) Paragraph 2 is designed to include an express reference to the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, ratione personae. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with under article 2. Article 2, paragraph 1 (b) (i) and (v) covers the various organs of the Government of a State and State representatives, including heads of State, irrespective of the systems of government. The reservation of article 3, paragraph 2, therefore refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States, without any suggestion that their status should in any way be affected by the present articles. The existing customary law is left untouched. 67/

(7) The present draft articles do not prejudge the extent of immunities granted by States to foreign sovereigns or other heads of State, their families or household staff which may also, in practice, cover other members

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67/ For the case law in this connection, see Yearbook ... 1986, vol. II, (Part One) document A/CN.4/388, paras. 119-125.

of their entourage. Similarly, the present articles do not prejudge the extent of immunities granted by States to heads of Government and ministers for foreign affairs. Those persons are, however, not expressly included in paragraph 2, since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons. A proposal was made at one stage to add after "heads of State" in paragraph 2, heads of government and ministers for foreign affairs, but was not accepted by the Commission.

Article 4

Non-retroactivity of the present articles

> Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present articles for the States concerned.

Commentary

(1) Under article 28 of the Vienna Convention on the Law of Treaties, non-retroactivity is the rule in the absence of any provision in the articles to the contrary. The question arises nevertheless as regards the nature and extent of the non-retroactive effect of the application of the present articles. It is necessary to determine a precise point in time at which the articles would apply as between the States which have accepted their provisions. The Commission has decided to select a time which is relatively precise, namely, that the principle of non-retroactivity applies to proceedings instituted prior to the entry into force of the articles as between the States concerned.

(2) Thus, as between the States concerned, the present articles are applicable in respect of proceedings instituted before a court after their entry into force. Article 4 therefore does not purport to touch upon the question of non-retroactivity in other contexts, such as diplomatic negotiations concerning the question of whether a State has violated its obligations under international law to accord jurisdictional immunity to another State in accordance with the rules of international law. This

article, by providing specifically for non-retroactivity in respect of a proceeding before a court, does not in any way affect the general rule of non-retroactivity under article 28 of the Vienna Convention on the Law of Treaties. The present draft articles are without prejudice to the application of other rules to which jurisdictional immunities of States and their property are subject under international law, independently of the present articles. Nor are they intended to prejudice current or future developments of international law in this area or in any other related areas not covered by them.

PART II

GENERAL PRINCIPLES

Article 5

State immunity

> A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles.

Commentary

(1) Article 5 as provisionally adopted at the thirty-second session of the Commission (then article 6) contained a commentary with an extensive survey of State judicial, executive and legislative practice. 68/ The commentary is

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68/ See Yearbook ... 1980, vol. II (Part Two), pp. 142-157, document A/35/10, chap. IV.B. Several other States have recently adopted legislation dealing directly with the subject of State immunity, namely: the Singapore State Immunity Act of 1979; the Pakistan State Immunity Ordinance of 1981; and the South Africa Foreign States Immunities Act of 1981, as amended in 1985 [and 1988*] (texts reproduced in United Nations, Materials on Jurisdictional Immunities ...); as well as the Canada Act to Provide for State Immunity in Canadian courts of 1982, Revised Statutes of Canada, 1985, vol. VIII, Chap. S-18; and the Australia Foreign States Immunities Act 1985, No. 196 of 1985, Acts of Parliament of the Commonwealth of Australia, 1985, vol. II, p. 2696. See also for the recent development of the general practice of State immunity, the second report of the Special Rapporteur, A/CN.4/422, pp. 2-12.

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* South Africa Foreign States Immunities Amendment Act, No. 5 of 1988. Assented to 3 March 1988. Date of commencement to be proclaimed. Not in force as of 5 April 1991.

still generally applicable, except for the passages dealing with the formula adopted then and the two-pronged approach to the formulation of immunity as conferring a right and also as imposing a duty. The second prong is now fully covered in article 6 on "modalities for giving effect to State immunity".

(2) The formulation of article 5, which expresses the main principle of State immunity, has been difficult as it is a delicate matter. Legal theories abound as to the exact nature and basis of immunity. There is common agreement that for acts performed in the exercise of the "prérogatives de la puissance publique" or "sovereign authority of the State", there is undisputed immunity. Beyond or around the hard core of immunity, there appears to be a grey zone in which opinions and existing case law and indeed legislation still vary. Some of these indicate that immunity constitutes an exception to the principle of territorial sovereignty of the State of the forum and as such should be substantiated in each case. Others refer to State immunity as a general rule or general principle of international law. This rule is not absolute in any event since even the most unqualified of all the theories of immunity admits one important exception, namely, consent which also forms the basis for other principles of international law. Others still adhere to the theory that the rule of State immunity is a unitary rule and is inherently subject to existing limitations. Both immunity and non-immunity are part of the same rule. In other words, immunity exists together with its innate qualifications and limitations.

(3) In formulating the text of article 5, the Commission has considered all the relevant doctrines as well as treaties, case law and national legislation, and was able to adopt a compromise formula stating a basic principle of immunity qualified by the provisions of the present articles incorporating those specifying the types of proceedings in which State immunity cannot be invoked. The text adopted on first reading contained square brackets specifying that State immunity was also subject to "the relevant rules of general international law". The purpose of that phrase had been to stress that the present articles did not prevent the development of international law and that, consequently, the immunities guaranteed to States were subject both to present articles and to general international law. This passage had given rise to a number of views, some in favour of its retention and others against. Some members who spoke against retention expressed the view that the retention of the phrase might entail the danger of allowing unilateral

interpretation of the draft articles to the extent that exceptions to State immunities could be unduly widened. The Commission finally decided to delete it on second reading for it was considered that any immunity or exception to immunity accorded under the present articles would have no effect on general international law and would not prejudice the future development of State practice. If the articles became a convention, they would be applicable only as between the States which became parties to it.

(4) Article 5 is also to be understood as the statement of the principle of State immunity forming the basis of the present draft articles and does not prejudge the question of the extent to which the articles, including article 5, should be regarded as codifying the rules of existing international law.

Article 6

Modalities for giving effect to State immunity

> 1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.
>
> 2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
>
> (a) is named as a party to that proceeding; or
>
> (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Commentary

Paragraph 1

(1) In article 6, paragraph 1, an attempt is made to identify the content of the obligation to give effect to State immunity and the modalities for giving effect to that obligation. The rule of State immunity may be viewed from the standpoint of the State giving or granting jurisdictional immunity, in which case a separate and complementary article is warranted. 69/ Emphasis is

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69/ Specific provisions to this effect are not uncommon in national legislation. See, for example, United Kingdom State Immunity Act (sect. 1 (2)); Singapore State Immunity Act (sect. 3 (2)); Pakistan State placed, therefore, not so much on the sovereignty of the State claiming immunity, but more precisely on the independence and sovereignty of the State which is required by international law to recognize and accord jurisdictional immunity to another State. Of course, the obligation to give effect to State immunity stated in article 6 applies only to those situations in which the State claiming immunity is entitled thereto under the present draft articles. Since immunity, under article 5, is expressly from the "jurisdiction of another State", there is a clear and unmistakable presupposition of the existence of "jurisdiction" of that other State over the matter under consideration; it would be totally unnecessary to invoke the rule of State immunity in the absence of jurisdiction. There is as such an indispensable and inseparable link between State immunity and the existence of jurisdiction of another State with regard to the matter in question.

(2) The same initial proposition could well be formulated in reverse, taking the jurisdiction of a State as a starting-point, after having established the firm existence of jurisdiction. Paragraph 1 stipulates an obligation to refrain from exercising such jurisdiction in so far as it involves, concerns or otherwise affects another State that is entitled to immunity and is unwilling to submit to the jurisdiction of the former. This restraint on the exercise of jurisdiction is prescribed as a proposition of international law and should be observed in accordance with detailed rules to be examined and clarified in subsequent draft articles. While this obligation to refrain from exercising jurisdiction against a foreign State may be regarded as a general rule, it is not unqualified. It should be applied in accordance with the provisions of the present articles. From the point of view of the absolute sovereignty of the State exercising its jurisdiction in accordance with its own internal law, any restraint or suspension of that exercise based on a requirement of international law could be viewed as a limitation.

(3) The first prerequisite to any question involving jurisdictional immunity is therefore the existence of a valid "jurisdiction", primarily under internal

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Immunity Ordinance (sect. 3 (2)); South Africa Foreign States Immunities Act (sect. 2 (2)); Canada Act to Provide for State Immunity in Canadian Courts (sect. 3 (2)). See also the European Convention on State Immunity (supra., note 41), art. 15.

law rules of a State, and, in the ultimate analysis, the assumption and exercise of such jurisdiction not conflicting with any basic norms of public international law. It is then that the applicability of State immunity may come into play. It should, however, be emphasized that the Commission is not concerned in the consideration of this topic with the compatibility with general international law of a State's internal law on the extent of jurisdiction. Without evidence of valid jurisdiction, there is no necessity to proceed to initiate, let alone substantiate, any claim of State immunity. The authority competent to examine the existence of valid jurisdiction may vary according to internal law, although, in practice, courts are generally competent to determine the existence, extent and limits of their own jurisdiction.

(4) It is easy to overlook the question concerning jurisdiction and to proceed to decide the issue of immunity without ascertaining first the existence of jurisdiction if contested on other grounds. The court should be satisfied that it is competent before proceedings to examine the plea of jurisdictional immunity. In actual practice, there is no established order of priority for the court in its examination of jurisdictional questions raised by parties. There is often no rule requiring the court to exhaust its consideration of other pleas or objections to jurisdiction before deciding the question of jurisdictional immunity.

(5) The second part of paragraph 1 reading "and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected" has been added to the text as adopted on first reading. Its purpose was to define and strengthen the obligation set forth in the first part of the provision. Respect for State immunity would be ensured all the more if the courts of the State of the forum, instead of simply acting on the basis of a declaration by the other State, took the initiative in determining whether the proceedings were really directed against that State, and whether the State was entitled to invoke immunity. Appearance before foreign courts to invoke immunity would involve significant financial implications for the contesting State and should therefore not necessarily be made the condition on which the question of State immunity is determined. On the other hand, the present provision is not intended to discourage the court appearance of the contesting State, which would provide the best assurance for obtaining a satisfactory result. The expression "shall ensure that its

courts" is used to make it quite clear that the obligation was incumbent on the forum State, which is responsible for giving effect to it in accordance with its internal procedures. The reference to article 5 indicates that the provision should not be interpreted as prejudging the question whether the State was actually entitled to benefit from immunity under the present articles.

Paragraph 2

(6) Paragraph 2 deals with the notion of proceedings before the courts of one State against another State. There are various ways in which a State can be impleaded or implicated in a litigation or a legal proceeding before the court of another State.

(7) Proceedings before the courts of one State are considered as having been instituted against another State if that other State is named as a party to the proceeding, or in a case where that other State itself is not a party to the proceeding, if the proceeding in effect seeks to affect the property, rights, interests or activities of that other State. The wording has been modified on second reading, in order to draw a clear distinction between two cases.

Paragraph 2 (a)

(8) A State is indubitably implicated in litigation before the courts of another State if a legal proceeding is instituted against it in its own name. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. It does not arise if the State agrees to become a party to the proceeding.

(9) Although, in the practice of States, jurisdictional immunity has been granted frequently in cases where a State as such has not been named as a party to the proceeding, in reality there is a surprising collection of instances of direct implication in proceedings in which States are actually named as defendants. 70/

70/ See, for example, F. Advokaat v. I. Schuddinck & den Belgischen Staat (1923) (Annual Digest of Public International Law Cases, 1923-1924 (London), vol. 2 (1933), case No. 69, p. 133); United States of America v. Republic of China (1950) (International Law Reports, 1950 (London)

(10) Paragraph 2, subparagraph (a), applies to all proceedings naming as a party the State itself or any of its entities or persons that are entitled to invoke jurisdictional immunity in accordance with article 2, paragraph 1, subparagraph (b).

Paragraph 2 (b)

(11) Without closing the list of beneficiaries of State immunities, it is necessary to note that actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered in the practice of States to be proceedings which in effect implicate the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions *in rem* or in admiralty against State-owned or State-operated vessels used for defence purposes and other peaceful uses, 71/ but also measures of prejudgement attachment or seizure (*saisie conservatoire*) as well as execution or measures in satisfaction of judgement (*saisie exécutoire*). The post-judgement or execution order will not be considered in the context of the present article, since it concerns not only immunity from jurisdiction but beyond that, also immunity from execution, a further stage in the process of jurisdictional immunities. 72/

(12) As has been seen, the law of State immunities has developed in the practice of States not so much from proceedings instituted directly against

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vol. 17 (1956), case No. 43, p. 168); *The "Hai Hsuan" - United States of America v. Yong Soon Fe and another* (1950) (ibid., case No. 44, p. 170); *Stato de Grecia, v. Di Capone* (1926) (*Rivista de diritto internazionale* (Rome), series III, vol. VI (1927), p. 102); *Pauer v. Hungarian People's Republic* (1956) (*International Law Reports, 1957* (London), vol. 24 (1961), p. 211; *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 4 (July 1976, p. 735)).

71/ See in this connection the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) (League of Nations, *Treaty Series*, vol. CLXXVI, p. 199); the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 1958) (United Nations, *Treaty Series*, vol. 516, p. 205), the Convention on the High Seas (Geneva, 1958) (ibid., vol. 450, p. 11) and the United Nations Convention on the Law of the Sea (Montego Bay, 1982) (United Nations publication, Sales No. E.83.V.5).

72/ See draft arts. 18-19 below.

foreign States or Governments in their own name, but more indirectly through a long line of actions for the seizure or attachment of vessels for maritime liens or collision damages or salvage services. 73/ State practice has been rich in instances of State immunities in respect of their men-of-war, 74/ visiting forces, 75/ ammunitions and weapons 76/ and aircraft. 77/ The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government, 78/ but clearly encompasses cases of property in actual possession or control of a foreign State. 79/ The

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73/ See, for example, The Schooner "Exchange" v. McFaddon (1812) (W. Cranch, Reports of Cases Argued and Adjudged in the Supreme Court of the United States, 3rd. ed. (New York, Banks Law Publishing, 1911), vol. VII, p. 116.); The "Prins Frederik" (1820) (J. Dodson, Reports of Cases Argued and Determined in the High Court of Admiralty (1815-1822) (London), vol. II (1828), p. 451); The "Charkieh" (1873) (United Kingdom, The Law Reports, High Court of Admiralty and Ecclesiastical Courts, vol. IV (1875), p. 97).

74/ See, for example, The "Constitution" (1879) (United Kingdom, The Law Reports, Probate Division, vol. IV (1879), p. 39); The "Ville de Victoria" and The "Sultan" (1887) (see G. Gidel, Le droit international public de la mer (Paris, Sirey, 1932), vol. II, p. 303); "El Presidente Pinto" (1891) and "Assari Tewfik" (1901) (see C. Baldoni, "Les navires de guerre dans les eaux territoriales étrangères", Recueil des cours de l'Académie de droit international de La Haye, 1938-III (Paris, Sirey, 1938), vol. 65, pp. 247 et. seq.).

75/ See, for example, the case The Schooner "Exchange" (1812) and the Status of Forces Agreements (see note 35 above).

76/ See, for example, Vavasseur v. Krupp (1878) (United Kingdom, The Law Reports, Chancery Division, vol. IX (1878), p. 351).

77/ See, for example, the case Hong Kong Aircraft-Civil Air Transport Inc. v. Central Air Transport Corp. (1953) (United Kingdom, The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1953, p. 70).

78/ See, for example, Juan Ysmael & Co. v. Government of the Republic of Indonesia (1954) (International Law Reports, 1954 (London), vol. 21 (1957), p. 95), and also cases involving bank accounts of a foreign Government, such as Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria (1977) (International Legal Materials (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471).

79/ See, for example, the "Philippine Admiral" (1975) (International Legal Materials, vol. XV, No. 1 (January 1976), p. 133).

Court should not so exercise its jurisdiction as to put a foreign sovereign in the position of choosing between being deprived of property or else submitting to the jurisdiction of the Court. 80/

(13) Subparagraph (b) applies to situations in which the State is not named as a party to the proceeding, but is indirectly involved, as for instance in the case of an action in rem concerning State property, such as a warship. The wording adopted on first reading has been simplified on second reading. First, the clause "so long as the proceeding in effect seeks to compel that ... State ... to submit to the jurisdiction of the court" was deleted as it was, in the case under consideration, meaningless. The words "to bear the consequences of a determination by the court which may affect", in the last part of the sentence was also deleted, because it appeared to create too loose a relationship between the procedure and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, those words have therefore been replaced by the words "to affect". Lastly, the Commission has deleted paragraph 3, which given the very elaborate definition of the term "State" contained in article 2, no longer had any point.

Article 7

Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

80/ Dollfus Mieg et Cie v. Bank of England (1950) (see note 49 above).

Commentary

(1) In the present part of the draft articles, article 5 enunciates the rule of State immunity while article 6 sets out the modalities for giving effect to State immunity. Following these two propositions, a third logical element is the notion of "consent", 81/ the various forms of which are dealt with in articles 7, 8 and 9 of this part. 82/

Paragraph 1

(a) The relevance of consent and its consequences

(2) Paragraph 1 deals exclusively with express consent by a State in the manner specified therein, namely, consent given by a State in an international agreement, in a written contract or by a declaration before the courts or by a written communication in a specific proceeding.

(i) Absence of consent as an essential element of State immunity

(3) As has been intimated in article 5 on State immunity and more clearly indicated in article 6 on the obligation to refrain from subjecting another State to its jurisdiction, the absence or lack of consent on the part of the State against which the court of another State has been asked to exercise jurisdiction is presumed. State immunity under article 5 does not apply if the State in question has consented to the exercise of jurisdiction by the court of another State. There will be no obligation under article 6 on the part of a State to refrain from exercising jurisdiction, in compliance with its rules of competence, over or against another State which has consented to such exercise. The obligation to refrain from subjecting another State to its

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81/ The notion of "consent" is also relevant to the theory of State immunity in another connection. The territorial or receiving State is sometimes said to have consented to the presence of friendly foreign forces passing through its territory and to have waived its normal jurisdiction over such forces. See, for example, Chief Justice Marshall in The Schooner "Exchange" v. MacFaddon (1812) (see note 73 above).

82/ For the legislative practice of States, see, for example, United States Foreign Sovereign Immunities Act of 1976 (sect. 1605 (a) (1)); United Kingdom State Immunity Act of 1978 (sect. 2); Singapore State Immunity Act of 1979 (sect. 4); Pakistan State Immunity Ordinance of 1981 (sect. 4); South Africa Foreign States Immunities Act of 1981 (sect. 3); Canada Act to Provide for State Immunity in Canadian Courts (sect. 4); Australia Foreign States Immunities Act of 1985 (sect. 10).

jurisdiction is not an absolute obligation. It is distinctly conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought.

(4) Consent, the absence of which has thus become an essential element of State immunity, is worthy of the closest attention. The obligation to refrain from exercising jurisdiction against another State or from impleading another sovereign Government is based on the assertion or presumption that such exercise is without consent. Lack of consent appears to be presumed rather than asserted in every case. State immunity applies on the understanding that the State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction. This unwillingness or absence of consent is generally assumed, unless the contrary is indicated. The court exercising jurisdiction against an absent foreign State cannot and does not generally assume or presume that there is consent or willingness to submit to its jurisdiction. There must be proof or evidence of consent to satisfy the exercise of existing jurisdiction or competence against another State.

(5) Express reference to absence of consent as a condition sine qua non of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to Member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction. 83/ The expression "without consent" often used in connection with the obligation to decline the exercise of jurisdiction is

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83/ See, for example, the reply of Trinidad and Tobago (June 1980) to question 1 of the questionnaire addressed to Governments:

> "The common law of the Republic of Trinidad and Tobago provides specifically for jurisdictional immunities for foreign States and their property and generally for non-exercise of jurisdiction over foreign States and their property without their consent. A court seized of any action attempting to implead a foreign sovereign or State would apply the rules of customary international law dealing with the subject." (United Nations, Materials on jurisdictional immunities ..., p. 610).

sometimes rendered in judicial references as "against the will of the sovereign State" or "against the unwilling sovereign". 84/

(ii) Consent as an element permitting exercise of jurisdiction

(6) If the lack of consent operates as a bar to the exercise of jurisdiction, it is interesting to examine the effect of consent by the State concerned. In strict logic, it follows that the existence of consent on the part of the State against which legal proceedings are instituted should operate to remove this significant obstacle to the assumption and exercise of jurisdiction. If absence of consent is viewed as an essential element constitutive of State immunity, or conversely as entailing the disability, or lack of power, of an otherwise competent court to exercise its existing jurisdiction, the expression of consent by the State concerned eliminates this impediment to the exercise of jurisdiction. With the consent of the sovereign State, the court of another State is thus enabled or empowered to exercise its jurisdiction by virtue of its general rules of competence, as though the foreign State were an ordinary friendly alien capable of bringing an action and being proceeded against in the ordinary way, without calling into play any doctrine or rule of State or sovereign immunity. 85/

84/ See, for example, Lord Atkin in The "Cristina" (1938), Annual Digest ... 1938-40 (London), vol. 9, case No. 36, p. 250):

> "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law, which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against this person or seek to recover from him specific damages." (ibid., p. 252).

85/ Thus, the Fundamentals of Civil Procedure of the USSR and the Union Republics, Approved in the Law of the Union of Soviet Socialist Republics dated 8 December 1961, provides in article 61: "The filing of a suit against a foreign State, the collection of a claim against it and the attachment of the property located in the USSR may be permitted only with the consent of the competent organs of the State concerned." (United Nations, Materials on jurisdictional immunities ..., p. 40).

(b) The expression of consent to the exercise of jurisdiction

(7) The implication of consent, as a legal theory in partial explanation or rationalization of the doctrine of State immunity, refers more generally to the consent of the State not to exercise its normal jurisdiction against another State or to waive its otherwise valid jurisdiction over another State without the latter's consent. The notion of consent therefore comes into play in more ways than one, with particular reference in the first instance to the State consenting to waive its jurisdiction (hence another State is immune from such jurisdiction) and to the instances under consideration, in which the existence of consent to the exercise of jurisdiction by another State precludes the application of the rule of State immunity. Consent of a State to the exercise of jurisdiction by another State could be given with regard to a particular case. Furthermore, the consent of a State with regard to a matter could be confined to a particular case only and consequently would not affect the immunity of the State with regard to a similar matter in another case. The Commission therefore slightly amended on second reading the end of the opening clause of the paragraph, to read: "with regard to the matter or case".

(8) In the circumstances under consideration, that is, in the context of the State against which legal proceedings have been brought, there appear to be several recognizable methods of expressing or signifying consent. In this particular connection, the consent should not be taken for granted, nor readily implied. Any theory of "implied consent" as a possible exception to the general principles of State immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognized exception. There is therefore no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner, including by the means provided in article 8. It remains to be seen how such consent would be given or expressed so as to remove the obligation of the court of another State to refrain from the exercise of its jurisdiction against an equally sovereign State.

(i) Consent given in a written contract, or by a declaration or a written communication in a specific proceeding

(9) An easy and indisputable proof of consent is furnished by the State's expressing its consent in a written contract, as provided in subparagraph (b), 86/ or in writing on an ad hoc basis for a specific case before the authority when a dispute has already arisen, as provided in subparagraph (c). In the latter case, a State is always free to communicate the expression of its consent to the exercise of jurisdiction by the court of another State in a legal proceeding against itself or in which it has an interest, by giving evidence of such consent in the form of an oral declaration before the court properly executed by one of its authorized representatives, such as an agent or counsel, or by a written communication through diplomatic channels or any other generally accepted channels of communication. By the same method, a State could also make known its unwillingness or lack of consent, or give evidence in writing which tends to disprove any allegation or assertion of consent. 87/ As originally worded, subparagraph (c) provided that the consent of the State could be expressed by a declaration before the court in a specific case. It was, however, pointed out that that wording would require a State wishing to make such a declaration to send a representative especially to appear before a national court; it should be possible to make such a declaration in a written communication to the plaintiff or to the court. The Commission therefore added on second reading the last part of subparagraph (c) to provide that the State

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86/ See, for example, Bayerischer Rundfunk c. Schiavetti Magnani (Corte di Cassazione, 12.1.1987) (Rivista di diritto internazionale privato e processuale, 1988, vol. 24, p. 512) concerning the employment in Italy of an Italian journalist by a German public broadcasting enterprise. The court found that the parties having agreed in the employment contract to confer exclusive jurisdiction on the courts of Italy, Bayerischer Rundfunk could not invoke immunity from jurisdiction and should be treated as a private enterprise.

87/ See, for example, statements submitted in writing to the Court by accredited diplomats, in Krajina v. The Tass Agency and another (1949) and in First Fidelity Bank v. the Government of Antigua and Barbuda (1989) (877 F 2d, p. 189, United States Court of Appeals, 2nd Cir., 7 June 1989); compare Compañia Mercantil Argentina v. United States Shipping Board (1924) and Baccus S.R.L. v. Servicio Nacional del Trigo (1956) (cases cited in note 47 above).

would have the possibility of consenting to the exercise of jurisdiction by means of such a written communication. The Commission also replaced on second reading the words "in a specific case" by the words "in a specific proceeding", to ensure better coordination between subparagraph (c) and the introductory clause of the paragraph.

(ii) Consent given in advance by international agreement

(10) The consent of a State could be given for one or more categories or cases. Such expression of consent is binding on the part of the State giving it in accordance with the manner and circumstances in which consent is given and subject to the limitations prescribed by its expression. The nature and extent of its binding character depend on the party invoking such consent. For instance, as provided under subparagraph (a) of paragraph 1, if consent is expressed in a provision of a treaty concluded by States, it is certainly binding on the consenting State, and States parties entitled to invoke the provisions of the treaty could avail themselves of the expression of such consent. 88/ The law of treaties upholds the validity of the expression of consent to jurisdiction as well as the applicability of other provisions of the treaty. Consequently, lack of privity to the treaty precludes non-parties from the benefit or advantage to be derived from the provisions thereof. If, likewise, consent is expressed in a provision of an international agreement concluded by States and international organizations, the permissive effect of such consent is available to all parties, including international organizations. On the other hand, the extent to which individuals and corporations may successfully invoke one of the provisions of the treaty or international agreement is generally dependent on the specific rules of the domestic legal order concerned on implementation of treaties.

(11) The practice of States does not go so far as to support the proposition that the court of a State is bound to exercise its existing jurisdiction over

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88/ In a recent case, Frolova v. Union of Soviet Socialist Republics (761 F 2d, p. 370, United States Court of Appeals, 7th Cir., 1 May 1985. The American Journal of International Law, vol. 79, p. 1057 (1985)), the United States Court of Appeals held that the Soviet Union had not implicitly waived its immunity for purposes of the Foreign Sovereign Immunities Act (FSIA) by signing the United Nations Charter and the Helsinki Accords. The court noted that the Congressional committee reports on the FSIA refer to waiver by treaty in the context of explicit waivers, but do not include waiver by treaty in the list of examples of implicit waivers.

or against another sovereign State which has previously expressed its consent to such jurisdiction in the provision of a treaty or an international agreement, 89/ or indeed in the express terms of a contract 90/ with the individual or corporation concerned. While the State having given express consent in any of these ways may be bound by such consent under international law or internal law, the exercise of jurisdiction or the decision to exercise or not to exercise jurisdiction is exclusively within the province and function of the trial court itself. In other words, the rules regarding the expression of consent by the State involved in a litigation are not absolutely binding on the court of another State, which is free to continue to refrain from exercising jurisdiction, subject, of course, to any rules deriving from the internal law of the State concerned. The court can and must devise its own rules and satisfy its own requirements regarding the manner in which such a consent could be given with desired consequences. The court may refuse to recognize the validity of consent given in advance and not at the time of the proceeding, not before the competent authority, or not given in facie curiae. 91/ The proposition formulated in draft article 7 is

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89/ There are certain multilateral treaties in point such as the 1972 European Convention on State Immunity (see note 41 above) and the 1926 Brussels Convention (see note 71 above), and those listed in United Nations, Materials on jurisdictional immunities ..., part III, sect. B, pp. 150 et seq. There are also a number of relevant bilateral trade agreements between non-socialist countries, between socialist countries and developed countries and between socialist countries and developing countries (ibid., part 3, sect. A.3 and A.4, pp. 140 et seq.).

90/ See, for example, an agreement between the Banque Française du Commerce Extérieur and the Kingdom of Thailand signed on 23 March 1978 in Paris by the authorized representative of the Minister of Finance of Thailand. Art. III, para. 3.04, provides:

> "For the purpose of jurisdiction and of execution or enforcement of any judgement or award, the Guarantor certifies that he waives and renounces hereby any right to assert before an arbitration tribunal or court of law or any other authority any defence or exception based on his sovereign immunity." (Malaya Law Review (Singapore), vol. 22, No. 1 (July 1980), p. 192, note 22).

91/ See, for example Duff Development Co. Ltd. v. Government of Kelantan and another (1924) (see note 30 above), where by assenting to the arbitration clause in a deed, or by applying to the courts to set aside the award of the therefore discretionary and not mandatory as far as the court is concerned. The court may or may not exercise its jurisdiction. Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent.

(12) Consent to the exercise of jurisdiction in a proceeding before a court of another State covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgement.

Paragraph 2

(13) Consent by a State to the application of the law of another State shall not be construed as its consent to the exercise of jurisdiction by a court of that other State. Questions of consent to the exercise of jurisdiction and of applicable law to the case must be treated separately. The Commission on second reading added paragraph 2 in order to provide that important clarification.

Article 8

Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted the proceeding; or

(b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

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arbitrator, the Government of Kelantan did not submit to the jurisdiction of the High Court in respect of a later proceeding by the company to enforce the award (op. cit., pp. 809 and 810). See also Kahan v. Pakistan Federation (1951) (see note 31 above) and Baccus S.R.L. v. Servicio Nacional del Trigo (1956) (see note 30 above).

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Commentary

(1) Article 8 deals with circumstances under which participation by a State in a proceeding before the courts of another State may be regarded as evidence of consent by that participating State to the exercise of jurisdiction by the courts concerned. The expression of consent or its communication must be explicit. Consent could also be evidenced by positive conduct of the State, but it cannot be presumed to exist by sheer implication, nor by mere silence, acquiescence or inaction on the part of that State. A clear instance of conduct or action amounting to the expression of assent, concurrence, agreement, approval or consent to the exercise of jurisdiction is illustrated by entry of appearance by or on behalf of the State contesting the case on the merits. Such conduct may be in the form of a State requesting to be joined as a party to the litigation, irrespective of the degree of its preparedness or willingness to be bound by the decision or the extent of its prior acceptance of subsequent enforcement measures or execution of judgement. 92/ In point of fact, the expression of consent either in writing, which is dealt with in article 7, or by conduct, which is the subject of the present commentary,

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92/ Although, for practical purposes, F. Laurent in his Le droit civil international (Brussels, Bruylant-Christophe, 1881), vol. III, pp. 80-81, made no distinction between "power to decide" (jurisdiction) and "power to execute" (execution), consent by a State to the exercise of the power to decide by the court of another State cannot be presumed to extend to the exercise of the power to execute or enforce judgement against the State having consented to the exercise of jurisdiction by appearing before the court without raising a plea of jurisdictional immunity.

entails practically the same results. They all constitute voluntary submission by a State to the jurisdiction, indicating a willingness and readiness on the part of a sovereign State of its own free will to submit to the consequences of adjudication by the court of another State, up to but not including measures of constraint which require separate consent of that foreign State.

Paragraph 1

(2) There is unequivocal evidence of consent to the assumption and exercise of jurisdiction by the court if and when the State knowingly enters an appearance in answer to a claim of right or to contest a dispute involving the State or over a matter in which it has an interest, and when such entry of appearance is unconditional and unaccompanied by a plea of State immunity, despite the fact that other objections may have been raised against the exercise of jurisdiction in that case on grounds recognized either under general conflict rules or under the rules of competence of the trial court other than by reason of jurisdictional immunity.

(3) By choosing to become a party to a litigation before the court of another State, a State clearly consents to the exercise of such jurisdiction, regardless of whether it is a plaintiff or a defendant, or indeed is in an ex parte proceeding, or an action in rem or in a proceeding seeking to attach or seize a property which belongs to it or in which it has an interest or property which is in its possession or control.

(a) Instituting or intervening in a legal proceeding

(4) One clearly visible form of conduct amounting to the expression of consent comprises the act of bringing an action or instituting a legal proceeding before a court of another State. By becoming a plaintiff before the judicial authority of another State, the claimant State, seeking judicial relief or other remedies, manifestly submits to the jurisdiction of the forum. There can be no doubt that when a State initiates a litigation before a court of another State, it has irrevocably submitted to the jurisdiction of the other State to the extent that it can no longer be heard to complain against the exercise of the jurisdiction it has itself initially invoked. 93/

93/ For example, the European Convention on State Immunity (see note 41 above), which provides, in article 1, para. 1, that:

> "A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State."

(5) The same result follows in the event that a State intervenes in a proceeding before a court of another State, unless, as stipulated in paragraph 2, the intervention is exclusively a plea of State immunity or made purposely to object to the exercise of jurisdiction on the ground of its sovereign immunity. 94/ Similarly, a State which participates in an interpleader proceeding voluntarily submits to the jurisdiction of that court. Any positive action by way of participation in the merits of a proceeding by a State on its own initiative and not under any compulsion is inconsistent with a subsequent contention that the volunteering State is being impleaded against its will. Subparagraph (b) provides also for a possibility for a State to claim immunity in the case where a State has taken a step relating to the merits of a proceeding before it had knowledge of facts on which a claim to immunity might be based. It had been pointed out that there might be circumstances in which a State would not be familiar with certain facts on the basis of which it could invoke immunity. It could happen that the State instituted proceedings or intervened in a case before it had acquired knowledge of such facts. In such cases, States should be able to invoke immunity on two conditions. First, the State must satisfy the court that it could only have acquired knowledge of the facts justifying a claim of immunity after it had intervened in the proceeding or had taken steps relating

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94/ Thus, according to art. 1, para. 3, of the European Convention on State Immunity:

> "A Contracting State which makes a counter-claim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counter-claim but also to the principal claim."

See also The Republic of Portugal v. Algemene Oliehandel International (AOI), District Court of Rotterdam, 2 April 1982, NJ (1983) No. 722, Netherlands Yearbook of International Law, vol. XVI, p. 522, 1985, in which Portugal's plea of immunity from jurisdiction must fail since it voluntarily submitted to the jurisdiction of a Dutch court when it objected to a default judgement of the Rotterdam District Court ordering Portugal to pay a sum of money to AOI.

to the merits of the case. Secondly, the State must furnish such proof at the earliest possible moment. 95/ The second sentence of paragraph 1 (b) which has been added on second reading, deals with that point.

(b) Entering an appearance on a voluntary basis

(6) A State may be said to have consented to the exercise of jurisdiction by a court of another State without being itself a plaintiff or claimant, or intervening in proceedings before that court. For instance, a State may volunteer its appearance or freely enter an appearance, not in answer to any claim or any writ of summons, but of its own free will to assert an independent claim in connection with proceedings before a court of another State. Unless the assertion is one concerning jurisdictional immunity in regard to the proceedings in progress, entering an appearance on a voluntary basis before a court of another State constitutes another example of consent to the exercise of jurisdiction, after which no plea of State immunity could be successfully raised.

Paragraph 2

(7) A State does not consent to the exercise of jurisdiction of another State by entering a conditional appearance or by appearing expressly to contest or challenge jurisdiction on the grounds of sovereign immunity or State immunity, although such appearances accompanied by further contentions on the merits to establish its immunity could result in the actual exercise of jurisdiction by

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95/ See, for example, subsects. 4 (a) and 4 (b) of sect. 2 of the United Kingdom State Immunity Act 1978 (The Public General Acts 1978 (H.M. Stationery Office), part I, chap. 33, p. 715; text reproduced in United Nations, Materials on jurisdictional immunities ..., pp. 41 *et seq.*). Subsect. 5 does not regard as voluntary submission any step taken by a State on proceedings before a court of another State:

> "... in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable."

Delay in raising a plea or defence of jurisdictional immunity may create an impression in favour of submission.

the court. 96/ Participation for the limited purpose of objecting to the continuation of the proceedings will not be viewed as consent to the exercise of jurisdiction either. 97/ Furthermore, a State may assert a right or interest in property by presenting prima facie evidence on its title at issue in a proceeding to which the State is not a party, without being submitted to the jurisdiction of another State, under paragraph 2 (b). But, if a State presents a claim on the property right in a proceeding, that is regarded as an intervention in the merit and accordingly the State cannot invoke immunity in that proceeding.

96/ There could be no real consent without full knowledge of the right to raise an objection on the ground of State immunity (Baccus S.R.L. v. Servicio Nacional del Trigo (1956) (see note 47 above), but see also Earl Jowitt, in Juan Ysmael & Co. v. Government of the Republic of Indonesia (1954) (see note 78 above)), where he said obiter that a claimant Government:

> "... must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim." (op. cit., p. 99).

Cf. the Hong Kong Aircraft case (see note 77 above), in which Sir Leslie Gibson of the Supreme Court of Hong Kong did not consider mere claim of ownership to be sufficient (International Law Reports, 1950 (London), vol. 17, case No. 45, p. 173). Contrast Justice Scrutton in The "Jupiter" No. 1 (1924) (United Kingdom, The Law Reports, Probate Division, 1924, p. 236), and Lord Radcliffe in the Gold bars case (1952) (op. cit. (see note 49 above), pp. 176-177).

97/ See, for example, art. 13 of the European Convention on State Immunity:

> "Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it."

See also Dollfus Mieg et Cie. S.A. v. Bank of England (1950) (see note 49 above).

Paragraph 3

(8) This paragraph was introduced here on second reading to identify another type of appearance of a State, or its representatives in their official capacity, in a proceeding before a court of another State that does not constitute evidence of consent by the participating State to the exercise of jurisdiction by the court. 98/ This exception to the rule of non-immunity related to a State's participation in a foreign proceeding, however, is limited to cases of appearance of the State, or its representatives as a witness, for example, to affirm that a particular person is a national of the State, and does not relate to all appearances of a State or its representatives in a foreign proceeding in the performance of the duty of affording protection to nationals of that State. 99/

Paragraph 4

(9) By way of contrast, it follows that failure on the part of a State to enter an appearance in a legal proceeding is not to be construed as passive submission to the jurisdiction. The term "failure" in the present article covers cases of non-appearance, either intentional or unintentional, in the sense of a procedural matter, and does not affect the substantive rules concerning the appearance or non-appearance of a State before foreign courts. 100/ Alternatively, a claim or interest by a State in property

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98/ See note 95 above.

99/ This provision, however, does not affect the privileges and immunities of members of a diplomatic mission or consular post of a State in respect of appearance before judicial or administrative proceedings of another State accorded under international law. See the Vienna Convention on Diplomatic Relations of 18 April 1961 (art. 31, para. 2) and the Vienna Convention on Consular Relations of 24 April 1963 (art. 44, para. 1).

100/ Thus, in Dame Lizarda dos Santos v. Republic of Iraq (Supreme Court, undated) (extraits in French in Journal du droit international, 1988, vol. 115, p. 472), the appeal of a Brazilian national employed as a cook at the Embassy of Iraq against a court decision to refrain from exercising immunity, on its own initiative, on the ground that Iraq has implicitly renounced its immunity, was rejected by the Court which stated that it could not recognize an implied waiver based solely on the State's refusal to respond to the complaint.

under litigation is not inconsistent with its assertion of jurisdictional immunity. 101/ A State cannot be compelled to come before a court of another State to assert an interest in a property against which an action in rem is in progress, if that State does not choose to submit to the jurisdiction of the court entertaining the proceedings.

Article 9

Counter-claims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

Commentary

(1) Article 9 follows logically from articles 7 and 8. While article 7 deals with the effect of consent given expressly by one State to the exercise of jurisdiction by a court of another State, article 8 defines the extent to

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101/ For example, in The "Jupiter" No. 1 (1924) (see note 96 above), Justice Hill held that a writ in rem against a vessel in the possession of the Soviet Government must be set aside inasmuch as the process against the ship compelled all persons claiming interests therein to assert their claims before the court, and inasmuch as the USSR claimed ownership in her and did not submit to the jurisdiction. Contrast The "Jupiter" No. 2 (1925), where the same ship was then in the hands of an Italian company and the Soviet Government did not claim an interest in her. (United Kingdom, The Law Reports, Probate Division, 1925, p. 69.)

which consent may be inferred from a State's conduct in participating in a proceeding before a court of another State. Article 9 is designed to complete the trilogy of provisions on the scope of consent by dealing with the effect of counter-claims against a State and counter-claims by a State.

(2) A State may institute a proceeding before a court of another State under article 8, paragraph 1 (a), thereby consenting or subjecting itself to the exercise of jurisdiction by that court in respect of that proceeding, including pre-trial hearing, trial and decisions, as well as appeals. Such consent to jurisdiction is not consent to execution, which is a separate matter to be dealt with in Part IV in connection with immunity of the property of States from attachment and execution. The question may arise as to the extent to which the initiative taken by a State in instituting that proceeding could entail its subjection or amenability to the jurisdiction of that court in respect of counter-claims against the plaintiff State. Conversely, a State against which a proceeding has been instituted in a court of another State may decide to make a counter-claim against the party which initiated the proceeding. In both instances, a State is to some extent amenable to the competent jurisdiction of the forum, since in either case there is clear evidence of consent by conduct or manifestation of volition to submit to the jurisdiction of that court. The consequence of the expression of consent by conduct, such as by a State instituting a proceeding, or by intervening in a proceeding to present a claim or, indeed, by making a counter-claim in a proceeding instituted against it, may indeed vary according to the effectiveness of its consent to the exercise of jurisdiction by the competent judicial authority concerned. In each of the three cases, an important question arises as to the extent and scope of the effect of consent to the exercise of jurisdiction in the event of such a counter-claim against or by a State.

(a) Counter-claims against a State

(3) The notion of "counter-claims" presupposes the prior existence or institution of a claim. A counter-claim is a claim brought by a defendant in

response or in answer to an original or principal claim. For this reason, there appear to be two possible circumstances in which counter-claims could be brought against a State. The first possibility is where a State has itself instituted a proceeding before a court of another State, as in article 8, paragraph 1 (a), and in article 9, paragraph 1. The second case occurs when a State has not itself instituted a proceeding but has intervened in a proceeding to present a claim. There is an important qualification as to the purpose of the intervention. In article 8, paragraph 1 (b), a State may intervene in a proceeding or take any other step relating to the merits thereof, and by such intervention subject itself to the jurisdiction of that court in regard to the proceeding, subject to the qualification provided in the same subparagraph. Article 9, paragraph 2, deals with cases where a State intervenes in order to present a claim; hence the possibility arises of a counter-claim being brought against the State in respect of the claim it has presented by way of intervention. There would be no such possibility of a counter-claim against an intervening State which had not also made a claim in connection with the proceeding. For instance, a State could intervene as an amicus curiae, or in the interest of justice, or to make a suggestion, or to give evidence on a point of law or of fact without itself consenting to the exercise of jurisdiction against it in respect of the entire proceeding. Such actions would not fall under paragraph 2 of article 9. Thus, as in article 8, paragraph 2 (a), a State could intervene to invoke immunity or, as in paragraph 2 (b) of that article, to assert a right or interest in property at issue in that proceeding. In the case of paragraph 2 (b) of article 8, the intervening State, in so far as it may be said to have presented a claim connected with the proceeding, could also be considered to have consented to a counter-claim brought against it in respect of the claim it has presented, quite apart from, and in addition to, its amenability to the requirement to answer a judicial inquiry or to give prima facie evidence in support of its title or claim to rights or interests in property as contemplated in article 8, paragraph 2 (b). Even to invoke immunity as envisaged in article 8, paragraph 2 (a), a State may also be required to furnish proof or the legal basis of its claim to immunity. But once the claim to immunity is sustained under article 8, paragraph 2 (a), or the claim or right or title is established under paragraph 2 (b), consent to the exercise of jurisdiction ceases. The court should, therefore, in such a case, refrain from further exercise of jurisdiction in respect of the State that is held to be immune or the property in which the State is found to have an interest, for the reason that the State and the property respectively would, in ordinary circumstances, be exempt from the jurisdiction of the court. Nevertheless, the court could continue to exercise jurisdiction if the proceeding fell within one of the exceptions provided in Part III or the State had otherwise consented to the exercise of jurisdiction or waived its immunity.

Paragraph 1

(4) As has been seen in article 8, paragraph 1 (a), a State which has itself instituted a proceeding is deemed to have consented to the jurisdiction of the court for all stages of the proceeding, including trial and judgement at first instance, appellate and final adjudications and the award of costs where such lies within the discretion of the deciding authority, but excluding execution of the judgement. Article 9, paragraph 1, addresses the question of the extent to which a State which has instituted a proceeding before a court of another State may be said to have consented to the jurisdiction of the court in respect of counter-claims against it. Clearly, the mere fact that a State has instituted a proceeding does not imply its consent to all other civil actions against the State which happen to be justiciable or subject to the jurisdiction of the same court or another court of the State of the forum. The extent of consent in such an event is not unlimited, and the purpose of article 9, paragraph 1, is to ensure a more precise and better balanced limit of the extent of permissible counter-claims against a plaintiff State. A State instituting a proceeding before a court of another State is not open to all kinds of cross-actions before that court nor to cross-claims by parties other than the defendants. A plaintiff State has not thereby consented to separate and independent counter-claims. There is no general submission to all other proceedings or all actions against the State, nor for all times. The State instituting a proceeding is amenable to the court's jurisdiction in respect of counter-claims arising out of the same legal relationship or facts

as the principal claim, 102/ or the same transaction or occurrence that is the subject-matter of the principal claim. 103/ In some jurisdictions, the effect of a counter-claim against a plaintiff State is also limited in amount, which cannot exceed that of the principal claim; or if it does exceed the principal claim, the counter-claims against the State can only operate as a set-off. 104/ This is expressed in American legal terminology as "recoupment

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102/ For example, the United Kingdom State Immunity Act 1978 (*The Public General Acts, 1978*, part 1, chap. 33, p. 715; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 41 *et seq*.) provides in sect. 2, subsect. (6), that:

> "A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim."

See also *Strousberg v. Republic of Costa Rica* (1881), *Law Times Reports* (London), vol. 44, p. 199, where the defendant was allowed to assert any claim he had by way of cross-action or counter-claim to the original action in order that justice might be done. But such counter-claims and cross-suits can only be brought in respect of the same transactions and only operate as set-offs.

103/ For example, the United States Foreign Sovereign Immunities Act of 1976 (*United States Code, 1976 Edition*, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 55 *et seq*.) provides in sect. 1607 (Counter-claims), subsect. (b), that immunity shall not be accorded with respect to any counter-claim "arising out of the transaction or an occurrence that is the subject-matter of the claim of the foreign State". Thus, in *Kunstsammlungen Zu Weimar and Grand Duchess of Saxony-Weimar v. Federal Republic of Germany and Elicofon* (United States Court of Appeals, 2nd Cir., 5 May 1982. *International Legal Materials*, vol. XXI, p. 773) where the court was asked to determine the ownership of two priceless Albrecht Duerer portraits based on the competing claims of East Germany, West Germany, the Grand Duchess of Saxony-Weimar, and a United States citizen who had purchased the drawings in good faith without knowledge that they were Duerers, it held that the Grand Duchess' cross-claim for annuities under a 1921 agreement did not come under the immunity exception for counter-claims arising out of the same transaction or occurrence as the claim of the foreign State.

104/ Sect. 1607, subsect. (c), of the United States Foreign Sovereign Immunities Act of 1976 states: "to the extent that the counter-claim does not seek relief exceeding in amount or differing in kind from that sought by the foreign State". See also *Strousberg v. Republic of Costa Rica* (1881) (see note 102 above) and *Union of Soviet Socialist Republics v. Belaiew* (1925) (*The All England Law Reports 1925* (reprint), p. 369).

against the sovereign claimant", which normally cannot go beyond "the point where affirmative relief is sought". 105/ Only defensive counter-claims against foreign States appear to have been permitted in common-law jurisdictions. 106/ On the other hand, in some civil-law jurisdictions, independent counter-claims have been allowed to operate as offensive remedies, and, in some cases, affirmative relief is known to have been granted. 107/

(5) Where the rules of the State of the forum so permit, article 9, paragraph 1, also applies in the case where a counter-claim is made against a State, and that State could not, in accordance with the provisions of the present articles, notably in Part III, invoke immunity from jurisdiction in respect of that counter-claim, had separate proceedings been brought against the State in those courts. 108/ Thus independent counter-claims, arising out

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105/ See, for example, South African Republic v. La Compagnie franco-belge du chemin de fer du Nord (1897) (United Kingdom, The Law Reports, Chancery Division, 1898, p. 190) and the cases cited in notes 102 and 104 above.

106/ For an indication of possible means of affirmative relief in justifiable circumstances, see Republic of Haiti v. Plesch et al. (1947) (New York Supplement, 2nd Series, vol. 73 (1947), p. 645); United States of Mexico v. Rask (1931) (Pacific Reporter, 2nd Series, vol. 4 (1931), p. 981); The International and Comparative Law Quarterly (London), vol. 2 (1953), p. 480; The Law Quarterly Review (London), vol. 71, No. 283 (July 1955), p. 305; The Modern Law Review (London), vol. 18 (1955), p. 417; Minnesota Law Review (Minneapolis, Minn.), vol. 40 (1956), p. 124. See, however, Alberti v. Empresa Nicaraguense de la Carne (705 F.2d, p. 250. United States Court of Appeals, 7th Cir., 18 April 1983).

107/ See, for example, Etat du Pérou v. Kreglinger (1857) (Pasicrisie belge, 1857 (Brussels), part 2, p. 348); Letort v. Gouvernement ottoman (1914) (Revue juridique internationale de la locomotion aérienne (Paris), vol. V (1914), p. 142).

108/ See, for example, the United States Foreign Sovereign Immunities Act of 1976 (see note 103 above), sect. 1607, subsect. (a), concerning counter-claims "for which a foreign State would not be entitled to immunity under sect. 1605 of this chapter had such claim been brought in a separate action against the foreign State". Cf. art. 1, para. 2, of the 1972 European Convention on State Immunity and Additional Protocol (see note 41 above).

of different transactions or occurrences not forming part of the subject-matter of the claim or arising out of a distinct legal relationship or separate facts from those of the principal claim, may not be maintained against the plaintiff State, unless they fall within the scope of one of the admissible exceptions under Part III. In other words, independent counter-claims or cross-actions may be brought against a plaintiff State only when separate proceedings are available against that State under other parts of the present articles, whether or not the State has instituted a proceeding as in paragraph 1 or has intervened to present a claim as in paragraph 2 of article 9.

Paragraph 2

(6) Paragraph 2 of article 9 deals with cases where a State intervenes in a proceeding before a court of another State not as an *amicus curiae*, but as an interested party, to present a claim. It is only in this sense that it is possible to conceive of a counter-claim being brought against a State which has intervened as a claimant, and not as a mere witness or merely to make a declaration, as in article 8, paragraph 1 (b), without presenting a claim. Once a State has intervened in a proceeding to make or present a claim, it is amenable to any counter-claim against it which arises out of the same legal relationship or facts as the claim presented by the State. Other parts of the commentary applicable to paragraph 1 concerning the limits of permissible counter-claims against a plaintiff State apply equally to counter-claims against an intervening claimant State, as envisaged in paragraph 2. They apply in particular to the identity of the legal relationship and facts as between the claim presented by the intervening State and the counter-claim, and possibly also to the quantum of the counter-claim and the extent or absence of allowable affirmative relief, if any, or of a remedy different in kind from, or beyond the limits of, the claim presented by the intervening State.

(b) Counter-claims by a State

Paragraph 3

(7) Where a State itself makes a counter-claim in a proceeding instituted against it before a court of another State, it is taking a step relating to the merits of the proceeding within the meaning of article 8, paragraph 1. In such a case, the State is deemed to have consented to the exercise of

jurisdiction by that court with respect not only to the counter-claim brought by the State itself, but also to the principal claim against it.

(8) By itself bringing a counter-claim before a judicial authority of another State, a State consents by conduct to the exercise of jurisdiction by that forum. However, the effect, extent and scope of counter-claims by a State under article 9, paragraph 3, could be wider than those of counter-claims against the plaintiff State under paragraph 1, or against the intervening claimant State under paragraph 2 of article 9. For one thing, counter-claims by a defendant foreign State, although usually limited by local law to matters arising out of the same legal relationship or facts as the principal claim, are not limited in respect of the extent or scope of the relief sought, nor in respect of the nature of the remedy requested. Indeed, if they arise out of a different legal relationship or a different set of facts from those of the principal claim or if they are truly new and separate or independent counter-claims, they are still permissible as independent claims or, indeed, as separate proceedings altogether unconnected with the principal or original claim against the State. It is clear that the defendant State has the choice of bringing a counter-claim against the plaintiff or instituting a fresh and separate proceeding. Whatever the alternative chosen, the State making the counter-claim under article 9, paragraph 3, or instituting a separate proceeding under article 8, paragraph 1, is deemed to have consented to the exercise of jurisdiction by that court. Under article 8, as has been seen, the plaintiff State has consented to all stages of the proceeding before all the courts up to judgement, but not including its execution. Likewise, under article 9, paragraph 3, a State is deemed to have consented to the exercise of jurisdiction with regard to its counter-claims and to the principal claim instituted against it. 109/

109/ See, for example, art. 1, para. 3, of the 1972 European Convention on State Immunity (see note 41 above), according to which:

> "A Contracting State which makes a counter-claim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counter-claim but also to the principal claim."

PART III

PROCEEDINGS IN WHICH STATE IMMUNITY CANNOT BE INVOKED

(1) The title of Part III, as adopted provisionally on first reading, contained two alternative titles in square brackets reading "[Limitations on] [Exceptions to] State Immunity" which reflected, on the one hand, the position of those States which had favoured the term "limitations" subscribing to the notion that present international law did not recognize the jurisdictional immunity of States in the areas dealt with in Part III and, on the other hand, the position of those which had favoured the term "exceptions" holding the view that the term correctly described the notion that State jurisdictional immunity was the rule of international law, and exceptions to that rule were made subject to the express consent of the State. The Commission adopted the present formulation on second reading to reconcile these two positions.

(2) It is to be kept in mind that the application of the rule of State immunity is a two-way street. Each State is a potential recipient or beneficiary of State immunity as well as having the duty to fulfil the obligation to give effect to jurisdictional immunity enjoyed by another State.

(3) In the attempt to specify areas of activity to which State immunity does not apply, several distinctions have been made between acts or activities to which State immunity is applicable and those not covered by State immunity. The distinctions, which have been discussed in greater detail in a document submitted to the Commission, 110/ have been drawn up on the basis of consideration of the following factors: dual personality of the State, 111/ dual capacity of the State, 112/ *acta jure imperii* and *acta jure gestionis*, 113/ which also relate to the public and private nature of State acts, 114/ and commercial and non-commercial activities. 115/ The Commission,

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110/ See *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357, paras. 35-45.

111/ *Idem*, para. 36.

112/ *Idem*, para. 37.

113/ *Idem*, paras. 38-39.

114/ *Idem*, paras. 40-42.

115/ *Idem*, paras. 43-45.

however, decided to operate on a pragmatic basis, taking into account the situations involved and the practice of States.

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(a) in the case of a commercial transaction between States; or

(b) if the parties to the commercial transaction have expressly agreed otherwise.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:

(a) suing or being sued; and

(b) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.

Commentary

(a) General observations on the draft article

(1) Article 10 as adopted by the Commission on second reading is now entitled "Commercial transactions", replacing the words "commercial contracts" originally adopted on first reading, consistent with the change made in article 2 (Use of terms), paragraph 1 (c). It constitutes the first substantive article of Part III, dealing with proceedings in which State immunity cannot be invoked.

Paragraph 1

(2) Paragraph 1 represents a compromise formulation. It is the result of continuing efforts to accommodate the differing viewpoints of those who are prepared to admit an exception to the general rule of State immunity in the field of trading or commercial activities, based upon the theory of implied consent, or on other grounds, and those who take the position that a plea of

State immunity cannot be invoked to set aside the jurisdiction of the local courts where a foreign State engages in trading or commercial activities. For reasons of consistency and clarity, the phrase "the State is considered to have consented to the exercise of" which appeared in the original text of paragraph 1 provisionally adopted on first reading has been amended to read "the State cannot invoke immunity", as a result of the Commission's second reading of the draft article. This change, which is also made in articles 11 to 14, does not, however, suggest any theoretical departure from various viewpoints as described above. The Commission held an extensive debate on this specified area of State activities 116/ and adopted a formula in an attempt to take into account the interests and views of all countries with different systems and practices.

(3) The application of jurisdictional immunities of States presupposes the existence of jurisdiction or the competence of a court in accordance with the relevant internal law of the State of the forum. The relevant internal law of the forum may be the laws, rules or regulations governing the organization of the courts or the limits of judicial jurisdiction of the courts and may also include the applicable rules of private international law.

(4) It is common ground among the various approaches to the study of State immunities that there must be a pre-existing jurisdiction in the courts of the foreign State before the possibility of its exercise arises and that such jurisdiction can only exist and its exercise only be authorized in conformity with the internal law of the State of the forum, including the applicable rules of jurisdiction, particularly where there is a foreign element involved in a dispute or differences that require settlement or adjudication. The expression "applicable rules of private international law" is a neutral one, selected to refer the settlement of jurisdictional issues to the applicable

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116/ See Yearbook ... 1982, vol. I, pp. 183-199, 1728th meeting, paras. 7-45, and 1729th to 1730th meetings; the discussion is summarized in Yearbook ... 1982, vol. II (Part Two), pp. 98-99, paras. 194-197. See also, comments and observations of Governments contained in document A/CN.4/410 and Add.1-5, and the Commission's discussion at its forty-first session, Official Records of the General Assembly: Forty-fourth Session, Supplement No. 10 (A/44/10), paras. 489-498.

rules of conflict of laws or private international law, whether or not uniform rules of jurisdiction are capable of being applied. Each State is eminently sovereign in matters of jurisdiction, including the organization and determination of the scope of the competence of its courts of law or other tribunals.

(5) The rule stated in paragraph 1 of article 10 concerns commercial transactions between a State and a foreign natural or juridical person when a court of another State is available and in a position to exercise its jurisdiction by virtue of its own applicable rules of private international law. The State engaging in a commercial transaction with a person, natural or juridical, other than its own national cannot invoke immunity from the exercise of jurisdiction by the judicial authority of another State where that judicial authority is competent to exercise its jurisdiction by virtue of its applicable rules of private international law. Jurisdiction may be exercised by a court of another State on various grounds, such as the place of conclusion of the contract, the place where the obligations under the contract are to be performed, or the nationality or place of business of one or more of the contracting parties. A significant territorial connection generally affords a firm ground for the exercise of jurisdiction, but there may be other valid grounds for the assumption and exercise of jurisdiction by virtue of the applicable rules of private international law.

Paragraph 2

(6) While the wording of paragraph 1, which refers to a commercial transaction between a State and a foreign natural or juridical person, implies that the State-to-State transactions are outside the scope of the present article, this understanding is clarified in paragraph 2, particularly because "foreign natural or juridical persons" could be interpreted broadly to include both private and public persons. 117/

117/ See, for example, Republic of Syria v. Arab Republic of Egypt (Supreme Court, undated) (extraits in French in Journal du droit international, 1988, vol. 115, p. 472) concerning the dispute of the ownership of a building purchased by Syria in Brazil, subsequently used by Egypt and retained by Egypt after the breaking of the union between the two States. By a one-vote majority, immunity from jurisdiction prevailed in the Court's split decision.

The Government Procurator held the view that a discussion of the substantive issues could be relevant only if the Arab Republic of Egypt

(7) Subparagraphs (a) and (b) of paragraph 2 are designed to provide precisely the necessary safeguards and protection of the interests of all States. It is a well-known fact that developing countries often conclude trading contracts with other States, while socialist States also engage in direct State-trading not only among themselves, but also with other States, both in the developing world and with the highly industrialized countries. Such State contracts, concluded between States, are excluded by subparagraph (a) of paragraph 2 from the operation of the rule stated in paragraph 1. Thus State immunity continues to be the applicable rule in such cases. This type of contract also includes various tripartite transactions for the better and more efficient administration of food aid programmes. Where food supplies are destined to relieve famine or revitalize a suffering village or a vulnerable area, their acquisition could be financed by another State or a group of States, either directly or through an international organization or a specialized agency of the United Nations, by way of purchase from a developing food-exporting country on a State-to-State basis as a consequence of tripartite or multilateral negotiations. Transactions of this kind not only help the needy population, but may also promote developing countries' exports instead of encouraging dumping or unfair competition in international trade. It should be understood that "a commercial transaction between States" means a transaction which involves all agencies and instrumentalities of the State, including various organs of government, as defined in article 2, paragraph (1) (b).

(8) Subparagraph (b) leaves a State party to a commercial transaction complete freedom to provide for a different solution or method of settlement of differences relating to the transaction. A State may expressly agree in the commercial transaction itself, or through subsequent negotiations, to

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accepted the Brazilian jurisdiction. He said that its right to refuse was clear, and would have been even according to the doctrine of restrictive immunity, still confused and hardly convincing, which made a distinction between acts *jure imperii* and *jure gestionis*. This was because the case at hand had nothing to do with any private business whatsoever, but concerned diplomatic premises within the context of State succession, which was exclusively and primarily within the domain of public international law.

arbitration or other methods of amicable settlement such as conciliation, good offices or mediation. Any such express agreement would normally be in writing.

Paragraph 3

(9) Paragraph 3 sets out a legal distinction between a State and certain of its entities in the matter of State immunity from foreign jurisdiction. In the economic system of some States, commercial transactions as defined in article 2, paragraph 1 (c), are normally conducted by State enterprises, or other entities established by a State, which have independent legal personality. The manner under which State enterprises or other entities are established by a State may differ according to the legal system of the State. Under some legal systems, they are established by a law or decree of the Government. Under some other systems, they may be regarded as having been established when the parent State has acquired majority shares or other ownership interests. As a rule, they engage in commercial transactions on their own behalf as separate entities from the parent State, and not on behalf of that State. Thus, in the event of a difference arising from a commercial transaction engaged in by a State entity, it may be sued before the court of another State and may be held liable for any consequences of the claim by the other party. In such a case, the immunity of the parent State itself is not affected, since it is not a party to the transaction.

(10) The application of the provision of paragraph 3 is subject to certain conditions. First, a proceeding must be concerned with a commercial transaction engaged in by a State enterprise or other entity. Secondly, a State enterprise or entity must have an independent legal personality. Such an independent legal personality must include the capacity to: (a) sue or be sued; and (b) acquire, own, possess and dispose of property, including property which the State has authorized the enterprise or entity to operate or manage. In some socialist States, the State property which the State empowers its enterprises or other entities to operate or manage is called "segregated State property". This terminology is not used in paragraph 3, since it is not universally applicable in other States. The requirements of subparagraphs (a) and (b) are cumulative: in addition to the capacity of such State enterprises and other entities to sue or be sued, they must also satisfy certain financial requirements as stipulated in subparagraph (b). Namely, they must be capable of acquiring, owning or possessing and of disposing of property - property that the State has authorized them to operate or manage as well as property

they gain themselves as a result of their activities. The term "disposing" in paragraph (b) is particularly important, because that makes the property of such entities, including the property which the State authorized them to operate or manage, potentially subject to measures of constraint, such as attachment, arrest and execution, to the satisfaction of the claimant.

(11) The text of paragraph 3 is the result of lengthy discussion in the Commission. The original proposal (former article 11 bis), which was submitted by the Special Rapporteur in response to the suggestion of some members and Governments, was an independent article relating specifically to State enterprises with segregated property. During the Commission's deliberation of the proposal, however, it was the view of some members that the provision was of limited application as the concept of segregated property was a specific feature of socialist States and should not be included in the present draft articles. However, the view of some other members was that the question of State enterprises performing commercial transactions as separate and legally distinct entities from the State had a much wider application as it was also highly relevant to developing countries and even to many developed countries. They further maintained that a distinction between such enterprises and the parent State should be clarified in the present draft articles in order to avoid abuse of judicial process against the State. The Commission, taking into account these views, adopted the present formulation which includes not only the State enterprise with segregated property but also any other enterprise or entity established by the State engaged in commercial transactions on its own behalf, having independent legal personality and satisfying certain requirements as specified in subparagraphs (a) and (b). The Commission further agreed to the inclusion of the provision as part of article 10 rather than as an independent article, since article 10 itself deals with "commercial transactions". One member, however, had serious reservations about the substance of paragraph 3 which, in his view, had been introduced to meet the concern of a limited number of States and likely to thwart the whole object of the draft articles which was to ensure the enforcement of commercial transactions and the performance of contractual obligations. Other members have stressed that the provisions of subparagraphs (a) and (b) did not add anything to the notion of "independent legal personality" and were therefore superfluous.

(12) Although not specifically dealt with in the draft articles, note should be taken of the question of fiscal matters particularly in relation to the provisions of article 10. It is recalled that former article 16 as provisionally adopted on first reading dealt with that particular question. 118/ One member expressed strong reservations with regard to the article, since it violated the principle of the sovereign equality of States by allowing a State to institute proceedings against another State before the courts of the former State. In this connection, a proposal was made to delete the article. The reason for the proposal was that the article concerned only the relations between two States, the forum State and the foreign State; it essentially dealt with a bilateral international problem governed by existing rules of international law. In contrast, the present draft articles dealt with relations between a State and foreign natural or juridical persons, the purpose being to protect the State against certain actions brought against it by such persons or to enable those persons to protect themselves against the State. Hence, the article which dealt with inter-State relations alone was not considered to have its proper place in the draft articles. There were members, however, who opposed the deletion of the article as it was based on extensive legislative practice and had been adopted on first reading. After some discussion, it was finally decided to delete former article 16 on the understanding that the commentary to article 10 would clarify that its deletion is without prejudice to the law with respect to fiscal matters.

(b) "Commercial transactions" in the context of State immunity

(13) In order to appreciate the magnitude and complexity of the problem involved in the consideration and determination of the precise limits of jurisdictional immunities in this specified area of "commercial transaction", 119/ it is useful to provide here, in a condensed form, a chronological survey of State practice relating to this question.

118/ See Yearbook ... 1986, vol. II (Part Two), p. 11.

119/ Art. 10 has to be read in conjunction with art. 2, para. 1 (c), on the definition of "commercial transaction", and art. 2, para. 2, on the interpretation of that definition. The commentaries to those provisions should also be taken into consideration.

(i) A survey of judicial practice: international and national

(14) This brief survey, of which a more detailed version has been submitted to the Commission, 120/ begins by mentioning one of the earliest cases, The "Charkieh" (1873), 121/ in which the exception of trading activities (for the purpose of the article, "commercial transactions") was recognized and applied in State practice. In this case, the court observed:

> "No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character." 122/

(15) The uncertainty in the scope of application of the rule of State immunity in State practice is, in some measure, accountable for the relative silence of judicial pronouncement on an international level. Nevertheless, by not pursuing the matter on the international level, a State affected by an adverse judicial decision of a foreign court may remain silent at the risk of acquiescing in the judgement or the treatment given, though, as will be seen in Part IV of the present draft articles, States are not automatically exposed to a measure of seizure, attachment and execution in respect of their property once a judgement which may adversely affect them has been rendered or obtained.

120/ See the fourth report of the former Special Rapporteur submitted to the Commission at its thirty-fourth session (Yearbook ... 1982, vol. II (Part One)), paras. 49-92; and the second report of the Special Rapporteur submitted to the Commission at its forty-first session (A/CN.4/422 and Corr.1), paras. 2-19.

121/ United Kingdom, The Law Reports, High Court of Admiralty and Ecclesiastical Courts, vol. IV (1875), p. 59.

122/ Ibid., pp. 99-100. This was the first case in which the commercial nature of the service or employment of a public ship was held to disentitle her from State immunity.

(16) The practice of States such as Italy, 123/ Belgium 124/ and

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123/ The courts of Italy were the first, in 1882, to limit the application of State immunity to cases where the foreign State had acted as an ente politico as opposed to a corpo morale (see Morellet v. Governo Danese (1882) (Giurisprudenza Italiana (Turin), vol. XXXV, part 1 (1883), p. 125)), or in the capacity of a sovereign authority or political power (potere politico) as distinguished from a persona civile (see Guttieres v. Elmilik (1886) (Il Foro Italiano (Rome), vol. XI, part 1 (1886), pp. 920-922)). See also
Hamspohn v. Bey de Tunisi (1887) (ibid., vol. XII, part 1 (1887), pp. 485-486).

In Italian jurisdiction, State immunity was allowed only in respect of atti d'impero and not atti di gestione. The public nature of the State act was the criterion by which it was determined whether or not immunity should be accorded. Immunity was not recognized for private acts or acts of a private-law nature. See Department of the Army of the United States of America v. Gori Savellini (Rivista di diritto internazionale (Milan), vol. XXXIX (1956), pp. 91-92, and International Law Reports, 1956 (London), vol. 23 (1960), p. 201)). Cf. La Mercantile v. Regno di Grecia (1955) (Rivista di diritto internazionale (Milan), vol. XXXVIII (1955), p. 376, and International Law Reports, 1955 (London), vol. 22 (1958), p. 240). More recently, in Banco de la Nación c. Credito Varesino (Corte di Cassazione, 19 October 1984) (Rivista di diritto internazionale privato e processuale, 1985, vol. 21, p. 635) concerning the debts arising from money transfers made by an Italian Bank in favour of a Peruvian bank, the court held that even assuming that the bank is a public entity, immunity from the jurisdiction of Italian courts could not be invoked with respect to a dispute arising not from the exercise of sovereign powers but from activities of a private nature.

124/ Belgian case law was settled as early as 1857 in a trilogy of cases involving the guano monopol of Peru. These cases are: (a) Etat du Pérou v. Kreglinger (1857) (see note 107 above); cf. E.W. Allen, The Position of Foreign States before Belgian Courts (New York, Macmillan, 1929), p. 8; (b) the "Peruvian Loans" case (1877) (Pasicrisie belge, 1877 (Brussels), part 2, p. 307); this case was brought not against Peru, but against the Dreyfus Brothers company; (c) Peruvian Guano Company v. Dreyfus et consorts et le Gouvernement du Pérou (1980) (ibid., 1881, part 2, p. 313). In these three cases, a distinction was drawn between the public activities of the State of Peru and its private activities with respect to which the Court of Appeals of Brussels denied immunity. Thus, like Italian courts, Belgian courts have, since 1888, also adopted the distinction between acts of the State in its sovereign (public) and civil (private) capacities: in Société pour la fabrication de cartouches v. Colonel Mutkuroff, Ministre de la guerre de la principauté de Bulgarie (1888) (ibid., 1889, part 3, p. 62), the Tribunal civil of Brussels held that, in concluding a contract for the purchase of bullets, Bulgaria had acted as a private person and subjected itself to all the consequences of the contract. Similarly, in Société anonyme des chemins de fer liégeois-luxembourgeois v. Etat néerlandais (Ministère du Waterstaat) (1903) (ibid., 1903, part 1, p. 294), a contract to enlarge a railway station in Holland was made subject to Belgian jurisdiction. The distinction between acta jure imperii and acta jure gestionis has been applied by Belgian courts consistently since 1907; see Feldman v. Etat de Bahia (1907) (ibid., 1908, part 2, p. 55).

Egypt 125/ which could be said to have led the field of "restrictive" immunity, denying immunity in regard to trading activities, may now have been overtaken by the recent practice of States which traditionally favoured a more unqualified doctrine of State immunity, such as Germany, 126/ the

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125/ The current case law of post-war Egypt has confirmed the jurisprudence of the country's mixed courts, which have been consistent in their adherence to the Italo-Belgian practice of limited immunity. In Egypt, jurisdictional immunities of foreign States constitute a question of *ordre public*; see Decision 1173 of 1963 of the Cairo Court of First Instance (cited in United Nations, *Materials on Jurisdictional Immunities ...*, p. 569). Immunity is allowed only in respect of acts of sovereign authority and does not extend to "ordinary acts" (ibid.).

126/ The practice of German courts began as early as 1885 with restrictive immunity based on the distinction between public and private activities, holding State immunity to "suffer at least certain exceptions"; see *Heizer v. Kaiser Franz-Joseph-Bahn A.G.* (1885) (*Gesetz und Verordnungsblatt für das Königreich Bayern* (Munich), vol. I (1885), pp. 15-16; cited in Harvard Law School, *Research in International Law*, part III, "Competence of Courts in regard to Foreign States" (hereinafter called "the Harvard draft") (Cambridge, Mass., 1932), published as *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 533-534). In the *Republic of Latvia* case (1953) (*Rechtsprechung zum Wiedergutmachungsrecht* (Munich), vol. 4 (1953), p. 368; *International Law Reports, 1953* (London), vol. 20 (1957), pp. 180-181), the Restitution Chamber of the Kammergericht of West Berlin denied immunity on the grounds that "this rule does not apply where the foreign State enters into commercial relations ... viz., where it does not act in its sovereign capacity but exclusively in the field of *private law*, by engaging in purely private business, and more especially in commercial intercourse". This restrictive trend has been followed by the Federal Constitutional Court in later cases; see, for example, *X v. Empire of ...* (*Entscheidungen des Bundesverfassungsgericht*) (Tübingen), vol. 16 (1964), p. 27; English trans. in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 282 et seq.), in which a contract for repair of the heating system of the Iranian Embassy was held to be "non-sovereign" and thus not entitled to immunity. In 1990, Germany ratified the European Convention on State Immunity (see note 41 above).

United States of America 127/

127/ It has sometimes been said that the practice of the courts of the United States of America started with an unqualified principle of State immunity. The truth might appear to be the opposite upon closer examination of the dictum of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII (3rd ed.), p. 116). In *Bank of the United States v. Planters' Bank of Georgia* (1824) (H. Wheaton, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. IX (4th ed.), pp. 904 and 907), it was held that, "when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen".

The first clear pronouncement of restrictive immunity by a United States court, based on the distinction between *acta jure imperii* and *act jure gestionis*, came in 1921 in *The "Pesaro"* case (United States of America, *The Federal Reporter*, vol. 277 (1922), pp. 473, at 479-480; see also *The American Journal of International Law* (Washington, D.C.), vol. 21 (1927), p. 108). This distinction was supported by the Department of State, but rejected by the Supreme Court in 1926 in *Berizzi Brothers Co. v. The S.S. "Pesaro"* (*United States Reports*, vol. 271 (1927), p. 562). In subsequent cases, the courts preferred to follow the suggestion of the political branch of the Government; see, for example, Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945) (ibid., vol. 324 (1946), pp. 30-42). It was not until the Tate Letter of 1952 (United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), pp. 984-985) that the official policy of the Department of State was restated in general and in the clearest language in favour of a restrictive theory of immunity based upon the distinction between *acta jure imperii* and *acta jure gestionis*. See, further, *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes* (United States of America, *Federal Reporter, 2nd Series*, vol. 336 (1965), p. 354; see also *International Law Reports* (London), vol. 35 (1967), p. 110).

Since the adoption of the Foreign Sovereign Immunities Act of 1976 (see note 103 above), United States courts have decided on the question of immunity, without any suggestion from the Department of State in the form of a "Tate Letter". It is this 1976 Act that now provides legislative guidance for the courts with regard to the exception of commercial activity. See, for example, *West v. Multibanco Comermex, S.A*. (807 F.2d 820. U.S. Court of Appeals, 9th Cir., 6 January 1987. *The American Journal of International Law* vol. 81, p. 660 (1987)); *Rush-Presbyterian-St. Luke's Medical Center v. The Hellenic Republic* (U.S. Court of Appeals, 7th Cir., 14 June 1989). Cf. *De Sanchez v. Banco Central de Nicaragua* (720 F.2d, p. 1385. U.S. Court of Appeals, 5th Cir., 19 Septembeer 1985. *The American Journal of International Law* vol. 80, p. 658 (1986)); *Gregorian v. Izvestia* (871 F.2d, p. 1515 U.S. Court of Appeals, 9th Cir., 12 April 1989); *Harris Corporation v. National Iranian Radio and Television and Bank Melli Iran* (U.S. Court of Appeals, 11th Circ. 22 November 1982, *International Law Reports*, vol. 72, p. 172 (1987)); *America West Airlines, Inc. v. GPA Group, Ltd*. (877 F.2d, and the United Kingdom. 128/

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p. 793. U.S. Court of Appeals, 9th Cir., 12 June 1989); MOL Inc. v. The People's Republic of Bangladesh (U.S. Court of Appeals, 9th Cir. 3 July 1984, International Law Reports, vol. 80, p. 583 (1989)).

128/ In connection with the commercial activities of a foreign State, notably in the field of shipping or maritime transport, the case law of the United Kingdom fluctuated throughout the nineteenth century. The decision which went furthest in the direction of restricting immunity was that of The "Charkieh" case (1873) (see the fourth report of the former Special Rapporteur submitted to the Commission at its thirty-fourth session (Yearbook ... 1982, vol. II (Part One)), para. 80). The decision which went furthest in the opposite direction was that of The "Porto Alexandre" case (1920) (United Kingdom, The Law Reports, Probate Division, 1920, p. 30). Thus the principle of unqualified immunity was followed in subsequent cases concerning commercial shipping, such as Compañia Mercantil Argentina v. United States Shipping Board (1924) (Annual Digest of Public International Law Cases, 1923-1924 (London), vol. 2 (1933), case No. 73, p. 138), and other trading activities, such as the ordinary sale of a quantity of rye in Baccus S.R.L. v. Servicio National del Trigo (1956) (United Kingdom, The Law Reports, Queen's Bench Division, 1957, vol. 1, p. 438).

However, even in The "Cristina" case (1938) (United Kingdom, The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938, p. 485; Annual Digest ..., 1938-1940 (London), vol. 9 (1942), case No. 86, p. 250), considerable doubts were thrown upon the soundness of the doctrine of immunity when applied to trading vessels, and some of the judges were disposed to reconsider the unqualified immunity held in The "Porto Alexandre" case (1920). Thus, in a series of cases which include Dollfus Mieg et Cie S.A. v. Bank of England (1950) (United Kingdom, The Law Reports, Chancery Division, 1950, p. 333), United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England (1952) (The All England Law Reports, 1952, vol. 1, p. 572), Sultan of Johore v. Abubakar, Tunku Aris Bendahara and others (1952) (ibid., p. 1261; see also The Law Quarterly Review (London), vol. 68 (1952), p. 293) and Rahimtoola v. Nizam of Hyderabad (1957) (United Kingdom, The Law Reports, House of Lords, 1958, p. 379), a trend towards a "restrictive" view of immunity was maintained. In the Dollfus Mieg et Cie S.A. case (1950), the Master of the Rolls, Sir Raymond Evershed, agreed with Lord Maugham that "the extent of the rule of immunity should be jealously watched". In the Sultan of Johore case (1952), Lord Simon, per curiam, denied that unqualified immunity was the rule in England in all circumstances.

A forerunner of the ultimate reversal of the unqualified immunity held in The "Porto Alexandre" case (1920) came in 1975 in the "Philippine Admiral" case, in which the decision in the "Parlement belge" case (1880) (United Kingdom, The Law Reports, Probate Division, 1879, vol. IV, p. 129) was distinguished and the Sultan of Johore case (1952) cited as establishing that the question of unqualified immunity was an open one when it came to State-owned vessels engaged in ordinary commerce.

(17) In Europe, the "restrictive" view of State immunity pronounced by the Italian and Belgian courts, as already noted, was soon followed also by the French, [129]

Then, in 1977, in *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (see note 59 above), the Court of Appeal unanimously held that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive doctrine of immunity should therefore apply to actions *in personam* as well as actions *in rem*. This emerging trend was reinforced by the State Immunity Act 1978 (see note 102 above), which came before the House of Lords for a decision in 1981 in the "*I Congreso del Partido*" case (1981) (*The All England Law Reports, 1981*, vol. 2, p. 1064). With the 1978 Act and this recent series of cases, the judicial practice of British courts must now be said to be well settled in relation to the exception of trading activities of foreign Governments. See also, *Planmount Limited v. The Republic of Zaire* (High Court, Queen's Bench Division (Commercial Court), 29 April 1980, *The International Law Reports*, vol. 64, p. 268 (1983)).

[129] A survey of the practice of French courts discloses traces of certain limitations on State immunity, based on the distinction between the State as *puissance publique* and as *personne privée*, and between *acte d'autorité* and *acte de gestion* or *acte de commerce*, in the judgements of lower courts as early as 1890; see *Faucon et Cie v. Gouvernement grec* (1890), (*Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 288). It was not until 1918, however, that the restrictive theory of State immunity was formulated and adopted by the French courts. See *Société maritime auxiliaire de transports v. Capitaine du vapeur anglais "Hungerford"* (Tribunal de commerce of Nantes, 1918) (*Revue de droit international privé* (Darras) (Paris), vol. XV (1919), p. 510); *Capitaine Seabrook v. Société maritime auxiliaire de transports* (Court of Appeal of Rennes, 1919) (ibid., vol. XVIII (1922-1923), p. 743); *Etat roumain v. Pascalet et Cie* (*Journal du droit international* (Clunet) (Paris), vol. 52 (1925), p. 113).

The current jurisprudence of France may be said to be settled in its adherence to the "restrictive" view of State immunity, based on "trading activities". The more recent decisions, however, have interpreted the theory of *actes de commerce* with some divergent results. For example, on the one hand, the purchase of cigarettes for a foreign army and a contract for a survey of water distribution in Pakistan were both held to be *actes de puissance publique* for public service; see, respectively, *Gugenheim v. State of Viet Nam* (1961) (*Revue générale de droit international public* (Paris), vol. 66 (1962), p. 654; reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., p. 257) and *Société Transshipping v. Federation of Pakistan* (1966) (*International Law Reports*, vol. 47 p. 150 (1974)). On the other hand, a contract for the commercial lease of an office for the tourist organization of a foreign Government and methods of raising loans both posed difficulties for the courts in applying the standards of *actes de commerce*; see, respectively, *Etat espagnol v. Société anonyme de l'Hôtel George V* (1970) (ibid., (Cambridge), vol. 52 (1979), p. 317; reproduced in United Nations,

Netherlands [130]

Materials on Jurisdictional Immunities ..., p. 267) and *Montefiore v. Congo belge* (1955) (*International Law Reports, 1955*, vol. 22 (1958), p. 226). In *Banque camerounaise de développement c. Société des Etablissements Robler* (Cour de cassation 18 November 1986) (*Journal du droit international*, 1987, vol. 114, p. 632) involving the aval guaranteed by the Banque camerounaise de développement, a public bank, on bills on exchange drawn by the State of Cameroon for the financing of the construction of a public hospital in Yaoundé, the court upheld the restrictive view of State immunity based on the distinction between the State as "*puissance publique*" and as *personne priveé*, and held that, regardless of the cause of the difference, the aval guaranteed by the bank on behalf of the State of Cameroon is a commercial transaction entered into in the normal exercise of banking activities and is not related to the exercise of *puissance publique*. See also, *Banque Tejarat-Iran c. S.A. Tunzini Nessi Entreprises Equipements* (Tribunal de Paris, 29 November 1982) (*Recueil Dalloz-Sirey*, 1983, *Inf. rap*., p. 302).

[130] A survey of the Netherlands courts indicates that, after the passage of a bill in 1917 allowing the courts to apply State immunity with reference to *acta jure imperii*, the question of *acta jure gestionis* remained open until 1923, when a distinction between the two categories of acts was made. However, the Netherlands courts remained reluctant to consider any activities performed by Governments to be other than an exercise of governmental functions. Thus a public service of tug boats, State loans raised by public subscription and the operation of a State ship were all considered to be *acta jure imperii*: see, respectively, *F. Advokaat v. Schuddinck & den Belgischen Staat* (1923) (*Weekblad van het Recht* (The Hague, 1923), No. 11088; *Annual Digest ..., 1923-1924* (London), vol. 2 (1933), case No. 69, p. 133), *E.C.E. de Froe v. USSR* (1932) (*Weekblad van het Recht* (The Hague, 1932), No. 124453; *Annual Digest ..., 1931-1932* (London), vol. 6 (1938), case No. 87, p. 170) and *The "Garbi"* (1938) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1939), No. 96; *Annual Digest ..., 1919-1942* (London), vol. 11 (1947), case No. 83, p. 155).

It was not until 1947 that the Netherlands courts were able to find and apply a more workable criterion for restricting State immunity, holding that "the principles of international law concerning the immunity of States from foreign jurisdiction did not apply to State-conducted undertakings in the commercial, industrial or financial fields"; see *Weber v. USSR* (1942) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1942), No. 757; *Annual Digest ..., 1919-1942* (op. cit.), case No. 74, p. 140) and *The Bank of the Netherlands v. The State Trust Arktikugol (Moscow)*; *The Trade Delegation of the USSR in Germany (Berlin)*; *The State Bank of the USSR (Moscow)* (1943) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1943), No. 600; *Annual Digest ..., 1943-1945* (London), vol. 12 (1949), case No. 26, p. 101). The exception of trading activities, however, was more clearly stated in the 1973 decision of the Netherlands Supreme Court in *Sociéte européenne d'études et d'entreprises en liquidation volontaire v. Socialist Federal Republic of Yugoslavia* (*Netherlands Yearbook of International Law, 1974* (Leiden), vol. V, p. 290; reproduced in and Austrian 131/ courts.

(18) The judicial practice of a certain number of developing countries can also be said to have adopted restrictive immunity. Egypt, as already noted, 132/ was the pioneer in this field. In recent years, the judicial practice of Pakistan 133/ and Argentina 134/ has provided examples of

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United Nations, Materials on Jurisdictional Immunities ..., p. 355). See also, L.F. and H.M.H.K. v. Federal Republic of Germany (FRG), District Court of Haarlem, 7 May 1986, KG (1986) No. 322, NJ (1987) No. 955 Netherlands Yearbook of International Law, vol. XX, pp. 285, at 287-290 (1989)).

131/ The practice of Austria has fluctuated, starting with unqualified immunity in the nineteenth century, changing to restrictive immunity from 1907 to 1926, and reverting to unqualified immunity until 1950. In Dralle v. Republic of Czechoslovakia, decided in 1950 (Osterreichische Juristen Zeitung (Vienna), vol. 5 (1950), p. 341, case No. 356; English trans. in United Nations, Materials on Jurisdictional Immunities ..., p. 183), the Supreme Court of Austria reviewed existing authorities on international law before reaching a decision denying immunity for what were not found to be acta jure gestionis. The Court declared:

> "... This subjection of the acta gestionis to the jurisdiction of States has its basis in the development of the commercial activity of States. The classic doctrine of immunity arose at a time when all the commercial activities of States in foreign countries were connected with their political activities ... Today the position is entirely different; States engage in commercial activities and ... enter into competition with their own nationals and with foreigners. Accordingly, the classic doctrine of immunity has lost its meaning, and, ratione cessante, can no longer be recognized as a rule of international law." (Osterreichische Juristen Zeitung ..., p. 347; United Nations, Materials on Jurisdictional Immunities ..., p. 195).

132/ See note 125 above.

133/ In its decision in 1981 in A. M. Qureshi v. Union of Soviet Socialist Republics through Trade Representative in Pakistan and another (All Pakistan Legal Decisions (Lahore), vol. XXXIII (1981), p. 377), the Supreme Court of Pakistan, after reviewing the laws and practice of other jurisdictions, as well as relevant international conventions and opinions of writers, and confirming with approval the distinction between acta jure imperii and acta jure gestionis, held that the courts of Pakistan had jurisdiction in respect of commercial acts of a foreign Government.

134/ An examination of the case law of Argentina reveals that the courts have recognized and applied the principle of sovereign immunity in various cases concerning sovereign acts of a foreign Government; see, for example, Baime y Bessolino v. Gobierno del Paraguay (1916) (Argentina, Fallos de la Corte Suprema de Justicia de la Nación (Buenos Aires), vol. 123, p. 58), acceptance of restrictive immunity, while in the case of the Philippines, 135/ there have been some relevant cases, but no decisions on the question of the exception of commercial transactions from State immunity.

(ii) *A survey of national legislation*

(19) A number of Governments have recently enacted legislation dealing comprehensively with the question of jurisdictional immunities of States and their property. While these laws share a common theme, namely the trend towards "restrictive" immunity, some of them differ in certain matters of important detail which must be watched. Without going into such details here, it is significant to compare the relevant texts relating to the "commercial contracts" exception as contained in the Foreign Sovereign Immunities Act of 1976 136/ of the United States of America and in the State Immunity Act

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United States Shipping Board v. Dodero Hermanos (1924) (ibid., vol. 141, p. 127) and *Zubiaurre v. Gobierno de Bolivia* (1899) (ibid., vol. 79, p. 124); all cases referred to in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 73-74. The exception of trading activities was applied in *The "Aguila"* case (1892) in respect of a contract of sale to be performed and complied with within the jurisdictional limits of the Argentine Republic (see *Ministro Plenipotenciario de Chile v. Fratelli Lavarello*, (*Fallos de la Corte Suprema de Justicia de la Nación*, vol. 47, p. 248). The court declared itself competent and ordered the case to proceed on the grounds that "the intrinsic validity of this contract and all matters relating to it should be regulated in accordance with the general laws of the Nation and that the national courts are competent in such matters" (see extract of the decision in United Nations, *Materials on Jurisdictional Immunities ...*, p. 73). See also I. Ruiz Moreno, *El Derecho Internacional Público ante la Corte Suprema* (Editorial Universitaria de Buenos Aires, 1941).

135/ See the fourth report of the former Special Rapporteur (see note 120 above), para. 92. For example, in *the United States of America, Capt. James E. Galloway, William I. Collins and Robert Gohier, petitioners, v. Hon. V.M. Ruiz* (Presiding Judge of Branch XV, Court of First Instance of Rizal and Eligio de Guzman & Co. Inc., respondents, No. L-35645, 22 May 1985, the Supreme Court of the Philippines, en banc. *Philippine Yearbook of International Law*, vol. XI, p. 87 (1985)), the Supreme Court of the Philippines held that contracts to repair a naval base related to the defence of a nation, a governmental function, and did not fall under the State immunity exception for commercial activities. There appears to be, however, no decisions upholding the exception of commercial transactions from State immunity. A similar situation is found also in Chile. See the fourth report of the former Special Rapporteur *Yearbook ... 1982*, vol. II (Part One), para. 91.

136/ See sections 1604 and 1605 (United Nations, *Materials on Jurisdictional Immunities ...*, pp. 57-58).

of 1978 137/ of the United Kingdom. The latter Act has, on this point, been followed closely by Pakistan, 138/ Singapore 139/ and South Africa 140/ and partly by Australia 141/ and Canada. 142/

(iii) A survey of treaty practice

(20) The attitude or views of a Government can be gathered from its established treaty practice. Bilateral treaties may contain provisions whereby parties agree in advance to submit to the jurisdiction of the local courts in respect of certain specified areas of activities, such as trading or investment. Thus the treaty practice of the Soviet Union amply demonstrates its willingness to have commercial relations carried on by State enterprises or trading organizations with independent legal personality regulated by competent territorial authorities. While the fact that a State is consistent in its practice in this particular regard may be considered as proof of the absence of rules of international law on the subject, or of the permissibility of deviation or derogation from such rules through bilateral agreements, an accumulation of such bilateral treaty practices could combine to corroborate the evidence of the existence of a general practice of States in support of the limitations agreed upon, which could ripen into accepted exceptions in

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137/ See Section 3 under the title "Exceptions from immunity" (ibid., p. 42).

138/ The State Immunity Ordinance of 1981, section 5 (*The Gazette of Pakistan* (Islamabad), 11 March 1981; text reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 21-22).

139/ State Immunity Act of 1979, section 5 (Singapore, *1979 Supplement to the Statutes of the Republic of Singapore*, reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, p. 29).

140/ The South Africa Foreign States Immunities Act of 1981, section 4 (1) (ibid., p. 36).

141/ The Australian Foreign States Immunities Act of 1985, section II (1) and (2) (*International Legal Materials*, vol. 25, 1986, p. 715).

142/ Act to provide for State immunity in Canadian courts (State Immunity Act) (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95), section 5.

international practice. 143/ However, at the time of first reading a member of the Commission maintained that the repeated inclusion of such an exception in specific agreements was based on consent and must not be taken to imply general acceptance of such an exception.

(21) The 1951 agreement between the Soviet Union and France, 144/ typical of treaties concluded between the Soviet Union and developed countries, and paragraph 3 of the exchange of letters of 1953 between the Soviet Union and India, 145/ which is an example of such agreements between the Soviet Union and developing countries, provide further illustrations of treaty practice relating to this exception.

143/ This view was substantiated by a member of the Commission. See the statement by Mr. Tsuruoka during the thirty-third session of the Commission, in which he referred to the trade treaties concluded by Japan with the United States of America in 1953 and with the USSR in 1957 (Yearbook ... 1981, vol. I, p. 63, 1654th meeting, para. 23).

144/ United Nations, Treaty Series, vol. 221, p. 95, art. 10. See similar provisions in treaties concluded by the USSR with Denmark (1946) (United Nations, Treaty Series, vol. 8, p. 201); Finland (1947) (ibid., vol. 217, p. 3); Italy (1948) (ibid., p. 181); Austria (1955) (ibid., vol. 240, p. 289); Japan (1957) (ibid., vol. 325, p. 35); Federal Republic of Germany (1958) (ibid., vol. 346, p. 71); the Netherlands (1971) (Tractatenblad van het Koninkrijk der Nederlanden (The Hague, 1971), No. 163). The relevant provisions of these treaties are reproduced in English in United Nations, Materials on Jurisdictional Immunities ..., pp. 140-144.

145/ Ibid., vol. 240, p. 157, sect. 3. See also similar provisions in treaties concluded by the USSR with other developing countries, such as Egypt (1956) (ibid., vol 687, p. 221); Iraq (1958) (ibid., vol. 328, p. 118); Togo (1961) (ibid., vol. 730, p. 187); Ghana (1961) (ibid., vol. 655, p. 171); Yemen (1963) (ibid., vol. 672, p. 315); Brazil (1963) (ibid., vol. 646, p. 277); Singapore (1966) (ibid., vol. 631, p. 125); Costa Rica (1970) (ibid., vol. 957, p. 347); Bolivia (1970) (ibid., p. 373). The relevant provisions of these treaties are reproduced in English in United Nations, Materials on Jurisdictional Immunities ..., pp. 145-150.

(iv) A survey of international conventions and efforts towards codification by intergovernmental bodies

(22) One regional convention, the 1972 European Convention on State Immunity, 146/ and one global convention, the 1926 Brussels Convention, 147/ addressed the question of commercial activities as an exception to State immunity. While article 7 of the European Convention is self-evident in addressing the issue, 148/ it needs to be observed that the main object of article 1 of the Brussels Convention 149/ was clearly to assimilate the position of State-operated merchant ships to that of private vessels of commerce in regard to the question of immunity.

(23) While the efforts of the Council of Europe culminated in the entry into force of the 1972 European Convention on State Immunity, similar efforts have been or are being pursued also in other regions. The Central American States, the Inter-American Council and the Caribbean States have been considering

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146/ See note 41 above.

147/ International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; United Nations, *Materials on Jurisdictional Immunities ...*, pp. 173 *et seq.*).

148/ Article 7 provides:

> "1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.
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> "2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing."

(ibid., p. 158).

149/ Article 1 provides:

> "Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipment."

similar projects. 150/ Another important development concerns the work of the Organization of American States on the Inter-American Draft Convention on Jurisdictional Immunity of States. In the early 1980s, the OAS General Assembly requested the Permanent Council, a political body, to study the Inter-American Draft Convention on Jurisdictional Immunity of States approved by the Inter-American Juridical Committee in 1983, 151/ which contains a provision limiting immunity in regard to "claims relative to trade or commercial activities undertaken in the State of the forum". 152/ The draft has been considered by a working group, established by the Permanent Council, which prepared a revised text as well as a comparative analysis of the two OAS drafts and the ILC draft on jurisdictional immunities. The revised OAS draft has been referred to Governments for their consideration.

(24) It may be said from the foregoing survey that while the precise limits of jurisdictional immunities in the area of "commercial transactions" may not be easily determined on the basis of existing State practice, the concept of non-immunity of States in respect of commercial activities as provided in the rule formulated in paragraph 1 of the present article finds precedent in the sources received above. 153/

150/ See, for example, the materials submitted by the Government of Barbados: "The Barbados Government is ... at the moment in the process of considering such legislation [as the United Kingdom State Immunity Act 1978] and in addition is spearheading efforts for a Caribbean Convention on State Immunity." (United Nations, Materials on Jurisdictional Immunities ..., pp. 74-75).

151/ Inter-American Draft Convention on Jurisdictional Immunity of States, adopted on 21 January 1983 by the Inter-American Juridical Committee (OEA/Ser.G-CP/doc. 1352/83 of 30 March 1983). See also International Legal Materials (Washington, D.C.), vol. XXII, No. 2 (1983), p. 292.

152/ According to the second paragraph of article 5 of the draft convention, "trade or commercial activities of a State" are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.

153/ See also the contributions from non-governmental bodies surveyed in the fourth report of the former Special Rapporteur (Yearbook ... 1982, vol. II (Part One), document A/CN.4/357, pp. 226-227). See further, for recent developments, Yearbook of the Institute of International Law, vol. 63, Part II, session of Santiago de Compostela, 1989; and International Law Association, Queens Conference (1990), International Committee on State Immunity, First Report on Developments in the field of State Immunity since 1982.

(25) The distinction made between a State and certain of its entities performing commercial transactions in the matter of State immunity from foreign jurisdiction appears to be generally supported by the recent treaties 154/ and national legislation 155/ as well as by the judicial

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154/ See, for example, the European Convention on State Immunity, article 27 (Council of Europe, European Convention on State Immunity and Additional Protocol, European Treaty Series, No. 74 (Strasbourg, 1972)) and the Union of Soviet Socialist Republics-United States Agreement on Trade Relations of 1 June 1990, article XII (1).

Provisions similar to the USSR/USA Agreement are found also in the Czechoslovakia-United States Agreement on Trade Relations of 12 April 1990, article XIV (1) and in the Mongolia-United States Agreement on Trade Relations of 23 January 1991, article XII (1).

155/ See, for example, the United Kingdom State Immunity Act of 1978, section 14 (1), (2) and (3); the Singapore State Immunity Act of 1979, section 16 (1), (2) and (3); the Pakistan State Immunity Ordinance of 1981, section 15 (1), (2) and (3); the South Africa Foreign States Immunities Act of 1981, sections 1 (2) and 15; and the Canada Act to provide for State immunity in Canadian Courts of 1982, sections 2, 3 (1), 11 (3) and 13 (2). See also the Australia Foreign Immunities Act of 1985, section 3 (1), the United States Foreign Sovereign Immunities Act of 1976, section 1603 (a) and (b) and section 1606 as well as section 452 of the third Restatement.

National legislation specially relevant in the present context are those recently enacted in several socialist States. See, for example, Law of the Union of Soviet Socialist Republics on State enterprises (amalgamations), dated 30 June 1987 (Vedomosti Verkhovnogo soveta SSR, 1 July 1987, No. 26 (2412), (Text 385, pp. 427-463) (section 1 (1), (2) and (6)); 1987 Decree on the Procedure for the Creation on the Territory of the USSR and the Activities of Joint Enterprises with the Participation of Soviet Organizations and Firms of Capitalist and Developing Countries (Decree of the USSR Council of Ministers adopted 13 January 1987. No. 49. SP SSSR (1987), No. 9, item 40; as amended by Decree No. 352 of 17 March 1988 and No. 385, 6 May 1989. Svod zakonov SSSR, IX. 50-19; SP SSSR (1989), No. 23, item 75); Law of the Union of Soviet Socialist Republics on Cooperatives in the USSR, adopted by the Supreme Soviet of the USSR on 1 June 1988 (arts. 5, 7 and 8); Law of the People's Republic of China on Industrial Enterprises owned by the Whole People, adopted on 13 August 1988 at the first session of the Seventh National People's Congress (art. 2); General Principles of the Civil Law of the People's Republic of China, adopted at the fourth session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on 12 April 1986 and effective as of 1 January 1987 (arts. 36, 37 and 41); the Enterprise with Foreign Property Participation Act of the Czechoslovak Federal Republic, the Act of 19 April 1990 amending the Enterprise with Foreign Property Participation Act No. 173 of 1988, Coll. (arts. 2 and 4).

practice of States, 156/ although specific approaches or requirements may

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156/ For the judicial practice of the United States of America, see, for example, Matter of SEDCO, Inc. (543 F. Supp. p. 561. U.S. District Court, S.D. Texas, 30 March 1982); O'Connel Machinery Co. v. M.V. "Americana" 734, F. 2d, p. 115. U.S. Court of Appeals, 2d Cir., 4 May 1984. See, however, First National City Bank v. Banco Para el Comercial Exterior de Cuba (1983) (103 S.Ct. p. 2591, 17 June 1873. The American Journal of International Law, vol. 78, p. 230 (1984)). See, further, Foremost-McKesson, Inc. v. Islamic Republic of Iran (905 F. 2d, p. 438. U.S. Court of Appeals, D.C. Cir., 15 June 1990), and Kalamazoo Spice Extraction Company v. The Provisional Military Government of Socialist Ethiopia (U.S. Foreign Sovereign Immunities Act; 26 August 1985. International Legal Materials, vol. 24, p. 1277 (1985)). Cf. Edlow International Co. v. Nuklearna Elektrarna Krsko (441, F. Supp., p. 827 (D.D.C. 1977), International Law Reports, vol. 63 (1982), p. 100).

For the judicial practice of the United Kingdom, see, for example, I Congreso del Partido (1983) (The Law Reports, 1983, vol. I, p. 244) in which the Appeals Court said:

> "State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their State, are a well-known feature of the modern commercial scene. The distinction between them, and their governing State, may appear artificial: but it is an accepted distinction in the law of England and other States. Quite different considerations apply to a State-controlled enterprise acting on government directions on the one hand, and a State, exercising sovereign functions, on the other." (ibid., p. 258, citations omitted).

Later in his opinion Lord Wilberforce rejected the contention that commercial transactions entered into by State-owned organizations could be attributed to the Cuban Government:

> "The status of these organizations is familiar in our courts, and it has never been held that the relevant State is in law answerable for their actions." (ibid., p. 271).

See also Trendtex Trading Corp. v. Central Bank of Nigeria (1977) (see note 59 above) in which the Court of Appeal rules that the C.B.N. was not an alter ego or organ of the Nigerian Government for the purpose of determining whether it could assert sovereign immunity; and C. Czarnikow Ltd. v. Centrala Hondlu Zagranicznego Rolimpex (Court of Appeal (1978) Q.B. 176, House of Lords (1979) A.C. 351, International Law Reports, vol. 64 (1983), p. 195) in which the House of Lords affirmed the decision of the lower court stating that in the absence of clear evidence and definite findings that the foreign government took the action purely in order to extricate a State enterprise from State contract liability, the enterprise cannot be regarded as an organ of the State.

For the judicial practice of Canada see, for example, Ferranti-Packard Ltd. v. Cushman Rentals Ltd. et al (International Law Reports, vol. 64 (1983),

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p. 63), and Bouchard v. J.L. Le Saux Ltée (1984), 45 O.R. (2d), p. 792. Ontario Supreme Court (Master's Chambers) (Canadian Yearbook of International Law, vol. XXIII, pp. 416-17 (1985)). In the former case, the Ontario High Court of Justice (Divisional Court) held that the New York State Thruway Authority was not an organ or alter ego of the State of New York but an independent body constituted so as to conduct its own commercial activities and, therefore, was not entitled to sovereign immunity. In the latter case, although the Senior Master reached the decision to set aside the service on the James Bay Energy Corporation on the ground that the corporation was entitled to sovereign immunity as an organ of the government of Quebec, he did consider the question of whether there was any evidence to show that the corporation was engaged in purely private or commercial activities.

For the judicial practice of France, see, for example, Corporación del Cobre v. Braden Copper Corporation and Société Groupement d'Importation des Métaux (International Law Reports, vol. 65 (1984), p. 57); Société des Ets. Poclain and Cie d'Assurances la Concorde v. Morflot USSR and Others (International Law Reports, vol. 65 (1984), p. 67). In Société Nationale des Transports Routiers v. Compagnie Algérienne de Transit et d'Affrétement Serres et Pilaire and Another (1979), (International Law Reports, vol. 65 (1984), p. 83) the Court of Cassation held as follows:

> "SNTR had a legal personality distinct from that of the Algerian State, was endowed with its own assets, against which the action of the creditors was exclusively directed, and performed commercial operations by transporting goods in the same way as an ordinary commercial undertaking. Having made these findings, the Court of Appeal correctly concluded, ... that SNTR could not claim before a French court either to exploit assets belonging to the Algerian State or, even if such had been the case, to act pursuant to an act of public power or in the interests of a public service. It therefore followed that SNTR was not entitled either to jurisdictional immunity or immunity from execution." (ibid., p. 85).

For the judicial practice of Germany, which may be said to have applied both the structural and the functional tests, see, for example, Non-resident Petitioner v. Central Bank of Nigeria (1975) (International Law Reports, vol. 65 (1984) p. 131) relating to a contract claim, in which the District Court of Frankfurt held that "[w]e need not decide whether, based on the responsibilities assigned to it, the respondent discharges sovereign functions and whether, under Nigerian law, the respondent acts as a juristic person and carried out in whole or in part the authority of the State in fulfilment of responsibilities under public law. The petitioner correctly points out that in accordance with general case law, legal publications and writings on international law, separate legal entities of a foreign State enjoy no immunity" (ibid., p. 134). The court added cautiously that, even if the defendant were a legally dependent government department, it would still not be entitled to immunity, since immunity from jurisdiction was only available in respect of acta jure imperii and not for acta jure gestionis. Also, in the

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National Iranian Oil Company Pipeline Contracts case, 1980 (ibid., vol. 65 (1984), p. 212), the Superior Provincial Court of Frankfurt held that there was no general rule of public international law to the effect that domestic jurisdiction was excluded for actions against a foreign State in relation to its non-sovereign activity (*acta jure gestionis*) and further stated as follows:

> "In German case law and legal doctrine, it is predominantly argued that commercial undertakings of a foreign State which have been endowed with their own independent legal personality do not enjoy immunity. ... what is decisive is that the defendant is organized under Iranian law as a public limited company - that is as a legal person in private law enjoying autonomy *vis-à-vis* the Iranian State."

See further, *In the Matter of Constitutional Complaints of the National Iranian Oil Company against Certain Orders of the District Court and the Court of Appeals of Frankfurt in Prejudgment Attachment Proceedings against the Complainant*. 37 *WM Zeitschrift für Wirtschafts- und Bankrecht* 722 (1983) (Federal Constitutional Court, 12 April 1983. English translation in *International Legal Materials*, vol. XXII, p. 1279 (1983)).

For the judicial practice of Switzerland, see, for example, *Banque Centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement SA* (1978) (*International Law Reports*, vol. 65 (1984), p. 417), in which the Federal Tribunal rejected the plea of immunity on the ground that the agreement for the provision of a "time deposit" between two commercial banks, to which a State was not a party and which had been concluded according to prevailing international banking practice, was to be classified according to its nature as a contract under private law (*jure gestionis*) over which the Swiss Courts had jurisdiction. In this case, it seems that the *ratione materiae* approach weighed. But, also in this case, it was indicated that the State Bank was deemed like a private bank as far as the transaction in question was concerned. See also *Banco de la Nación Lima v. Banco Cattolica del Veneto*, (1984) (*International Law Reports*, vol. 82 (1990), p. 10); *Swissair v. X and Another* (1985) (Federal Tribunal, *International Law Reports*, vol. 82 (1990), p. 36) and *Banque du Gothard v. Chambre des Recours en Matière Pénale du Tribunal d'Appel du Canton du Tessin and Another* (1987) (Federal Tribunal, *International Law Reports*, vol. 82, p. 50). In the latter case the bank deposits of the Vatican City Institute were dealt with in the same manner as that of a foreign State bank.

Some other cases relevant to the question of State enterprises or other entities in relation to immunity of States from the jurisdiction of foreign courts include, Belgium: *S.A. "Dhlellemes et Masurel" v. Banque Centrale de la République de Turquie* (Court of Appeal of Brussels, 1963, *International Law Reports*, vol. 45 (1972) p. 85); Italy: *Hungarian Papal Institute v. Hungarian Institute (Academy) in Rome* (Court of Cassation, 1960, *International Law Reports*, vol. 40 (1970), p. 59).

The judicial practice of developing countries on foreign State enterprises or entities is not readily discernible due to the lack of vary among them. 157/

Article 11

Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

(b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time when the proceeding is instituted; or

(e) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

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information. With regard to the practice of Indian courts see, for example, New Central Jute Mills Co. Ltd. v. VEB Deutfracht Seereederei Rostock (Calcutta High Court, A.I.R. 1983, cal. 225, Indian Journal of International Law, vol. 23 (1983), p. 589) in which the Court held that VEB Deutfracht Seereederei Rostock which was a company incorporated under the laws of the German Democratic Republic was not a "State" for the purposes of national legislation requiring consent of the Indian Central Government to sue a foreign State, but did not decide whether the entity should be considered as part of a State for the purposes of jurisdictional immunity under international law.

157/ See C. Schreuer, State Immunity: Some Recent Developments, 1988, pp. 92-124.

Commentary

(a) Nature and scope of the exception of "contracts of employment"

(1) Draft article 11 adopted by the Commission covers an area commonly designated as "contracts of employment", which has recently emerged as an exception to State immunity. "Contracts of employment" have been excluded from the expression "commercial transaction" as defined in article 2, paragraph 1 (c) of the present draft articles. They are thus different in nature from commercial transactions.

(2) Without technically defining a contract of employment, it is useful to note some of the essential elements of such a contract for the purposes of article 11. The area of exception under this article concerns a contract of employment or service between a State and a natural person or individual for work performed or to be performed in whole or in part in the territory of another State. Two sovereign States are involved, namely the employer State and the State of the forum. An individual or natural person is also an important element as a party to the contract of employment, being recruited for work to be performed in the State of the forum. The exception to State immunity applies to matters arising out of the terms and conditions contained in the contract of employment.

(3) With the involvement of two sovereign States, two legal systems compete for application of their respective laws. The employer State has an interest in the application of its law in regard to the selection, recruitment and appointment of an employee by the State or one of its organs, agencies or instrumentalities acting in the exercise of governmental authority. It would also seem justifiable that for the exercise of disciplinary supervision over its own staff or government employees, the employer State has an overriding interest in ensuring compliance with its internal regulations and the prerogative of appointment or dismissal which results from unilateral decisions taken by the State.

(4) On the other hand, the State of the forum appears to retain exclusive jurisdiction if not, indeed, an overriding interest in matters of domestic public policy regarding the protection to be afforded to its local labour force. Questions relating to medical insurance, insurance against certain risks, minimum wages, entitlement to rest and recreation, vacation with pay, compensation to be paid on termination of the contract of employment, etc., are of primary concern to the State of the forum, especially if the employees

were recruited for work to be performed in that State, or at the time of recruitment were its nationals or habitual or permanent residents there. Beyond that, the State of the forum may have less reason to claim an overriding or preponderant interest in exercising jurisdiction. The basis for jurisdiction is distinctly and unmistakably the closeness of territorial connection between the contracts of employment and the State of the forum, namely performance of work in the territory of the State of the forum, as well as the nationality or habitual residency of the employees. Indeed, local staff working, for example, in a foreign embassy would have no realistic way to present a claim other than in a court of the State of the forum. 158/ Article 11, in this respect, provides an important guarantee to protect their legal rights. The employees covered under the present article include both regular employees and short-term independent contractors.

(b) The rule of non-immunity

(5) Article 11 therefore endeavours to maintain a delicate balance between the competing interests of the employer State with regard to the application of its law and the overriding interests of the State of the forum for the application of its labour law and in certain exceptional cases also in retaining exclusive jurisdiction over the subject-matter of a proceeding.

(6) Paragraph 1 thus represents an effort to state the rule of non-immunity. In its formulation, the basis for the exercise of jurisdiction by the competent court of the State of the forum is apparent from the place of performance of work under the contract of employment in the territory of the State of the forum. Reference to the coverage of its social security provisions incorporated in the original text adopted on first reading has been deleted on second reading, since not all States have social security systems

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158/ See, for example, S. c. Etat indien (Tribunal fédéral, 22 May 1984) (Annuaire suisse de droit international, 1985, vol. 41, p. 172) concerning the dismissal of a locally recruited Italian national originally employed by the Embassy of India to Switzerland as a radio-telegraphist, subsequently carrying out drafting, translation and photography, finally working as an office employee. The court held that, since the employee was an Italian national, carried out activities of a subordinate nature and had been recruited outside India, he had no link with the State of India and exercise of jurisdiction on the case could not cause any prejudice to the discharge of State functions, and, therefore, that the employment contract was not in the realm of the puissance publique of India and the Swiss courts had jurisdiction over the case.

in the strict sense of the term and some foreign States may prefer that their employees not be covered by the social security system of the State of the forum. Furthermore, there were social security systems whose benefits did not cover persons employed for very short periods. If the reference to social security provisions was retained in article 11, such persons would be deprived of the protection of the courts of the forum State. However, it was precisely those persons who were in the most vulnerable position and who most needed effective judicial remedies. The reference to recruitment in the State of the forum which appeared in the original text adopted on first reading has also been deleted.

(7) Paragraph 1 is formulated as a residual rule, since States can always agree otherwise, thereby adopting a different solution by waiving local labour jurisdiction in favour of immunity. Respect for treaty regimes and for the consent of the States concerned is of paramount importance, since they are decisive in solving the question of waiver or of exercise of jurisdiction by the State of the forum or of the maintenance of jurisdictional immunity of the employer State. Without opposing the adoption of paragraph 1, some members felt that paragraph 1 should provide for the immunity of the State as a rule and that paragraph 2 should contain the exceptions to that rule.

(c) Circumstances justifying maintenance of the rule of State immunity

(8) Paragraph 2 strives to establish and maintain an appropriate balance by introducing important limitations on the application of the rule of non-immunity, by enumerating circumstances where the rule of immunity still prevails.

(9) Paragraph 2 (a) enunciates the rule of immunity for the engagement of government employees of rank whose functions are closely related to the exercise of governmental authority. Examples of such employees are private secretaries, code clerks, interpreters, translators and other persons entrusted with functions related to State security or basic interests of the State. 159/ Officials of established accreditation are, of course, covered by

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159/ See, for example, the judicial practice of Italy: Console generale britannico in Napoli v. Ferraino (Corte di Cassazione (Sezioni Unite), 17 January 1986, No. 283, The Italian Yearbook of International Law, vol. VII, pp. 298-299 (1986-1987)); Console generale belga in Napoli v. Esposito (Corte this subparagraph. Proceedings relating to their contracts of employment will not be allowed to be instituted or entertained before the courts of the State of the forum. The Commission on second reading considered that the expression "services associated with the exercise of governmental authority" which had appeared in the text adopted on first reading might lend itself to unduly extensive interpretation, since a contract of employment concluded by a State stood a good chance of being "associated with the exercise of governmental authority", even very indirectly. It was suggested that the exception provided for in subparagraph (a) was justified only if there was a close link between the work to be performed and the exercise of governmental authority. The word "associated" has therefore been amended to read "closely related". In order to avoid any confusion with contracts for the performance of services which were dealt with in the definition of a "commercial transaction" and were therefore covered by article 11, the word "services" was replaced by the word "functions" on second reading.

(10) Paragraph 2 (b) is designed to confirm the existing practice of States 160/ in support of the rule of immunity in the exercise of the

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di Cassazione (Sezioni Unite), 3 February 1986, No. 666, ibid.); *Panattoni c. Repubblica federale di Germania* (*Corte di Cassazione*, 15 July 1987) (*Rivista di diritto internazionale*, 1988, vol. 71, p. 902).

For the judicial practice of some other States, see for example, Poland: *Maria B. v. Austrian Cultural Institute in Warsaw* (Supreme Court, 25 March 1987, *International Law Reports*, vol. 82 (1990), p. 1); Germany: *Conrades v. United Kingdom of Great Britain and Northern Ireland* (Hanover Labour Court. 4 March 1981, *International Law Reports*, vol. 65 (1984), p. 205); Belgium: *Portugal v. Goncalves*, Civil Court of Brussels (Second Chamber) (11 March 1982, *International Law Reports*, vol. 82 (1990), p. 115); Switzerland: *Tsakos v. Government of the United States of America* (Labour Tribunal of Geneva. 1 February 1972, *International Law Reports*, vol. 75 (1987), p. 78); United Kingdom: *Sengupta v. Republic of India* (Employment Appeal Tribunal. 17 November 1982, *International Law Reports*, vol. 64 (1983), p. 352).

160/ See, for example, in the judicial practice of Italy, the interesting decision rendered in 1947 by the United Sections of the Supreme Court of Cassation in *Tani v. Rappresentanza commerciale in Italia dell'U.R.S.S.* (*Il Foro Italiano* (Rome), vol. LXXI (1948), p. 855; *Annual Digest ..., 1948* (London), vol. 15 (1953), p. 141, case No. 45), in which the Soviet Trade Delegation was held to be exempt from jurisdiction in matters of employment of an Italian citizen, being *acta jure imperii*, notwithstanding the fact that the appointing authority was a separate legal entity, or for that matter a foreign discretionary power of appointment or non-appointment by the State of an individual to any official post or employment position. This includes actual

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corporation established by a State. Also in this case, no distinction was made between diplomatic and commercial activities of the trade agency. Similarly, in 1955, in Department of the Army of the United States of America v. Gori Savellini (Rivista di diritto internazionale (Milan), vol. XXXIX (1956), pp. 91-92; International Law Reports (London), vol. 23 (1960), p. 201), the Court of Cassation declined jurisdiction in an action brought by an Italian citizen in respect of his employment by a United States military base established in Italy in accordance with the North Atlantic Treaty, this being an attività pubblicistica connected with the funzioni pubbliche o politiche of the United States Government. The act of appointment was performed in the exercise of governmental authority, and as such considered to be an atto di sovranità.

In Rappresentanza commerciale dell'U.R.S.S. v. Kazmann (1933) Rivista ... (Rome), 25th year (1933), p. 240; Annual Digest ..., 1933-1934 (London), vol. 7 (1940), p. 178, case No. 69, concerning an action for wrongful dismissal brought by an ex-employee of the Milan branch of the Soviet Trade Delegation, the Italian Supreme Court upheld the principle of immunity. This decision became a leading authority followed by other Italian courts in other cases, such as Little v. Riccio e Fischer (Court of Appeal of Naples, 1933) (Rivista ..., 26th year (1934), p. 110) (Court of Cassation, 1934) (Annual Digest ..., 1933-1934, op. cit., p. 177, case No. 68); the Court of Appeal of Naples and the Court of Cassation disclaimed jurisdiction in this action for wrongful dismissal by Riccio, an employee in a cemetery the property of the British Crown and "maintained by Great Britain jure imperii for the benefit of her nationals as such, and not for them as individuals". Furthermore, in another case, Luna v. Repubblica socialista di Romania (1974) (Rivista ... (Milan), vol. LVIII (1975), p. 597), concerning an employment contract concluded by an economic agency forming part of the Romanian Embassy, the Supreme Court dismissed Luna's claim for 7,799,212 lire as compensation for remuneration based on the employment contract. The court regarded such labour relations as being outside Italian jurisdiction.

See the practice of Dutch courts, for example, in M.K. v. Republic of Turkey, (The Hague Sub-District Court, 1 August 1985, Institute's Collection No. R 2569; Netherlands Yearbook of International Law, vol. XIX, p. 435 (1988)) concerning the application for a declaration of nullity in respect of the dismissal of a Dutch secretary employed at the Turkish Embassy in The Hague. The court held that the conclusion of a contract of employment with a Dutch clerical worker who had no diplomatic or civil service status was an act which the defendant performed on the same footing as a natural or legal person under private law and that there was no question whatsoever there of a purely governmental act; the defendant, who was represented by his ambassador, entered into a legal transaction on the same footing as a natural or legal person under private law. The court accordingly decided that the defendant's plea of immunity must therefore be rejected and further that since the defendant gave notice of dismissal without the consent of the Director of the appointment which under the law of the employer State is considered to be a unilateral act of governmental authority. So also are the acts of "dismissal" or "removal" of a government employee by the State, which normally take place after the conclusion of an inquiry or investigation as part of supervisory or disciplinary jurisdiction exercised by the employer State. This subparagraph also covers cases where the employee seeks the renewal of his employment or reinstatement after untimely termination of his engagement. The rule of immunity applies to proceedings for recruitment, renewal of employment and reinstatement of an individual only. It is without prejudice to the possible recourse which may still be available in the State of the forum for compensation or damages for "wrongful dismissal" or for breaches of obligation to recruit or to renew employment. In other words, this subparagraph does not prevent an employee from bringing action against the employer State in the State of the forum to seek redress for damage arising from recruitment,

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Regional Employment Office [Gewestelijk Arbeidsbureau] without K's consent and without any urgent reason existing or even having been alleged, the dismissal was void.

See also the practice of Spanish courts, for example, in E.B.M. c. Guinea Ecuatorial (Tribunal Supremo, 10 February 1986, abstract in Revista Española de Derecho Internacional, 1988, vol. 40, II, p. 10) concerning the application of a Spanish national for reinstatement as a receptionist at the Embassy of Equatorial Guinea. The court said that granting Equatorial Guinea immunity from jurisdiction would imply an extension by analogy of the rules on diplomatic immunity and the recognition of absolute immunity of States from jurisdiction as a basic principle or customary rule of international law, while this principle was presently being questioned by the doctrine, and national courts were exercising their jurisdiction over sovereign States in matters in the sphere of acta jure gestionis; and in D.A. c. Sudáfrica (Tribunal Supremo, 1 December 1986, abstract in Revista Española de Derecho Internacional, 1988, vol. 40, II, p. 11) in which the court upheld the application of a non-Spanish national for reinstatement as a secretary in the Embassy of South Africa, stating that acta jure gestionis were an exception to the general rules on jurisdictional immunity of States.

With regard to the practice of Belgian courts see, for example, Castanheira c. Office commercial du Portugal (1980) (Tribunal du travail de Bruxelles, abstract in Revue belge de droit international, 1986, vol. 19, p. 368) which related to an employment contract between a Portuguese national and the Portuguese public entity Fundo de Fomenteo de Exportacao. The Tribunal held that while, as an emanation of the State, the entity could in principle enjoy immunity from jurisdiction, the employment contract had the characteristics of an acte de gestion privée. Immunity was therefore denied.

renewal of employment or reinstatement of an individual. The Commission on second reading replaced the words "the proceeding relates to" adopted on first reading by the words "the subject of the proceeding is" to clarify this particular point. The new wording is intended to make it clear that the scope of the exception is restricted to the specific acts which are referred to in the subparagraph and which are legitimately within the discretionary power of the employer State.

(11) Paragraph 2 (c) also favours the application of State immunity where the employee was neither a national nor a habitual resident of the State of the forum, the material time for either of these requirements being set at the conclusion of the contract of employment. If a different time were to be adopted, for instance the time when the proceeding is initiated, further complications would arise as there could be incentives to change nationality or to establish habitual or permanent residence in the State of the forum, thereby unjustly limiting the immunity of the employer State. The protection of the State of the forum is confined essentially to the local labour force, comprising nationals of the State of the forum and non-nationals who habitually reside in that State. Without the link of nationality or habitual residence, the State of the forum lacks the essential ground for claiming priority for the exercise of its applicable labour law and jurisdiction in the face of a foreign employer State, in spite of the territorial connection in respect of place of recruitment of the employee and place of performance of services under the contract.

(12) Another important safeguard to protect the interest of the employer State is provided in paragraph 2 (d). The fact that the employee has the nationality of the employer State at the time of the initiation of the proceeding is conclusive and determinative of the rule of immunity from the jurisdiction of the courts of the State of the forum. As between the State and its own nationals, no other State should claim priority of jurisdiction on matters arising out of contracts of employment. Remedies and access to courts exist in the employer State. Whether the law to be applied is the administrative law or the labour law of the employer State, or of any other State, would appear to be immaterial at this point.

(13) Finally, paragraph 2 (e) provides for the freedom of contract, including the choice of law and the possibility of a chosen forum or forum prorogatum. This freedom is not unlimited. It is subject to considerations of public

policy or ordre public or, in some systems, "good moral and popular conscience", whereby exclusive jurisdiction is reserved for the courts of the State of the forum by reason of the subject-matter of the proceeding.

(14) The rules formulated in article 11 appear to be consistent with the emerging trend in the recent legislative and treaty practice of a growing number of States. 161/

(15) It was observed in the Commission that the provision of paragraph 2 (c) might deprive of every legal protection persons who were neither nationals nor habitual residents of the State of the forum at the relevant time.

161/ With regard to the provision of paragraph 2 (c) of article 11, see for example, the United Kingdom State Immunity Act 1978 (The Public General Acts, 1978, part 1, chap. 33, p. 715; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 41 et seq.) which provides in subsection (2) (b) of section 4 that the non-immunity provided for in subsection (1) of that section does not apply if:

> "(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; ..."

Subsection (2) (b) of section 6 of Pakistan's State Immunity Ordinance, 1981 (The Gazette of Pakistan (Islamabad), 11 March 1981; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 20 et seq.), subsection (2) (b) of section 6 of Singapore's State Immunity Act, 1979 (1979 Supplement to the Statutes of the Republic of Singapore; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 28 et seq.), subsection (1) (b) of section 5 of South Africa's Foreign States Immunities Act, 1981 (reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 34 et seq.), section 12 (3) of Australia's Foreign States Immunities Act of 1985 and paragraph 2 (b) of article 5 of the 1972 European Convention on State Immunity (Council of Europe, European Convention on State Immunity and Additional Protocol, European Treaty Series (Strasbourg), No. 74 (1972)) are worded in similar terms.

The United Kingdom State Immunity Act 1978 (sect. 4, subsect. (2) (a)), Pakistan's State Immunity Ordinance, 1981 (sect. 6, subsect. (2) (a)), Singapore's State Immunity Act, 1979 (sect. 6, subsect. 2 (a)), South Africa's Foreign States Immunities Act, 1981 (sect. 5, subsect. (1) (c)) and the 1972 European Convention (art. 5, para. 2 (a)) grant immunity to the employer State if the employee is a national of that State at the time when the proceeding is instituted.

Article 12

Personal injuries and damage to property

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Commentary

(1) This article covers an exception to the general rule of State immunity in the field of tort or civil liability resulting from an act or omission which has caused personal injury to a natural person or damage to or loss of tangible property. 162/

(2) This exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*. Although the State is as a rule immune from the jurisdiction of the courts of another State, for this exceptional provision immunity is withheld.

(3) The exception contained in this article is therefore designed to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State. Since the damaging act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed. A court foreign to the scene of the delict might be considered as a *forum non conveniens*. The injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity.

162/ See the State practice cited in the fifth report of the former Special Rapporteur (*Yearbook ... 1983*, vol. II, Part One; A/CN.4/363 and Add.1, paras. 76-99). See also Australia Foreign States Immunities Act of 1985, Section 13.

(4) Furthermore, the physical injury to the person or the damage to tangible property, resulting in death or total loss or other lesser injury, appears to be confined principally to insurable risks. The areas of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats. In other words, the article covers most areas of accidents involved in the transport of goods and persons by rail, road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals. In addition, the scope of article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination. 163/

163/ See, for example, the possibilities unfolded in Letelier v. Republic of Chile (1980) (United States of America, Federal Supplement, vol. 488 (1980), p. 665); see also H.D. Collums, "The Letelier case: Foreign sovereign liability for acts of political assassination", Virginia Journal of International Law (Charlottesville, Va.), vol. 21 (1981) p. 251. Chile-United States Agreement to Settle Dispute Concerning Compensation for the Deaths of Letelier and Moffit. Done at Santiago, 11 June 1990. International Legal Materials, vol. XXX, p. 421 (1991).

See also, Olsen v. Mexico (729 F.2d, p. 641 U.S. Court of Appeals, 9th Cir., 30 March 1984. As amended 16 July 1984); Frolova v. Union of Soviet Socialist Republics (761 F.2d, p. 370. U.S. Court of Appeals, 7th Cir., 1 May 1985); Gerritsen v. De La Madrid (819 F.2d, p. 1511. U.S. Court of Appeals, 9th Cir., 18 June 1987); Helen Liu v. The Republic of China (Court of Appeals, 9th Cir., 29 December 1989, International Legal Materials, vol. XXIX, p. 192 (1990)). However, acts committed outside the territory of the State of the forum are excluded from the application of this article. See for example, United States: McKeel v. Islamic Republic of Iran (U.S. Court of Appeals, 9th Cir., 30 December 1983, International Law Reports, vol. 81 (1990), p. 543); Perez et al v. The Bahamas, Court of Appeals, District of Columbia Circuit. 28 April 1981, International Law Reports, vol. 63 (1982), p. 601; Berkovitz v. Islamic Republic of Iran and Others. U.S. Court of Appeals, 9th Cir., 1 May 1984, International Law Reports, vol. 81 (1990), p. 552; Argentina Republic v. Amerada Hess Shipping Corp. (488 U.S. 428. U.S. Supreme Court, 23 January 1989. The American Journal of International Law, vol. 83 (1989), p. 565).

(5) Article 12 does not cover cases where there is no physical damage. Damage to reputation or defamation is not personal injury in the physical sense, nor is interference with contract rights or any rights, including economic or social rights, damage to tangible property.

(6) The existence of two cumulative conditions is needed for the application of this exception. The act or omission causing the death, injury or damage must occur in whole or in part in the territory of the State of the forum so as to locate the locus delicti commissi within the territory of the State of the forum. In addition, the author of such act or omission must also be present in that State at the time of the act or omission so as to render even closer the territorial connection between the State of the forum and the author or individual whose act or omission was the cause of the damage in the State of the forum.

(7) The second condition, namely the presence of the author of the act or omission causing the injury or damage within the territory of the State of the forum at the time of the act or omission, has been inserted to ensure the exclusion from the application of this article of cases of transboundary injuries or trans-frontier torts or damage, such as export of explosives, fireworks or dangerous substances which could explode or cause damage through negligence, inadvertence or accident. It is also clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict, which constitute clear violations of the territory of a neighbouring State under public international law, are excluded from the areas covered by article 12. The article is primarily concerned with accidents occurring routinely within the territory of the State of the forum, which in many countries may still require specific waiver of State immunity to allow suits for recovering damages to proceed, even though compensation is sought from, and would ultimately be paid by, an insurance company. 164/

164/ In some countries, where proceedings cannot be instituted directly against the insurance company, this exception is all the more necessary. In other countries, there are legislative enactments making insurance compulsory for representatives of foreign States, such as the United States Foreign Missions Amendments Act of 1983, (public law 98-164 of 22 November 1983, title VI, sect. 603 (United States Statutes at Large, 1983, vol. 97, p. 1042)), amending the United States Code, title 22, section 204.

(8) The basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality. The *locus delicti commissi* offers a substantial territorial connection regardless of the motivation of the act or omission, whether intentional or even malicious, or whether accidental, negligent, inadvertent, reckless or careless, and indeed irrespective of the nature of the activities involved, whether *jure imperii* or *jure gestionis*. This distinction has been maintained in the case law of some States 165/ involving motor accidents in the course of official or military duties. While immunity has been maintained for acts *jure imperii*, it has been rejected for acts *jure gestionis*. The exception proposed in article 12 makes no such distinction, subject to a qualification in the opening paragraph indicating the reservation which in fact allows different rules to apply to questions specifically regulated by treaties, bilateral agreements or regional arrangements specifying or limiting the extent of liabilities or compensation, or providing for a different procedure for settlement of disputes. 166/

(9) In short, article 12 is designed to allow normal proceedings to stand and to provide relief for the individual who has suffered an otherwise actionable physical damage to his own person or his deceased ancestor, or to his property. The cause of action relates to the occurrence or infliction of physical damage occurring in the State of the forum, with the author of the

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165/ See, for example, the judgements delivered in Belgium, in *S.A. "Eau, gaz, électricité et applications" v. Office d'aide mutuelle* (1956) (*Pasicrisie belge* (Brussels), vol. 144 (1957), part 2, p. 88; *International Law Reports*, 1956, vol. 23 (1960), p. 205); in the Federal Republic of Germany, in *Immunity of United Kingdom from Jurisdiction (Germany)* (1957) (*International Law Reports*, 1957, vol. 24 (1961), p. 207); in Egypt, in *Dame Safia Guebali v. Colonel Mei* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 55 (1942-1943), p. 120; *Annual Digest ..., 1943-1945* (London), vol. 12 (1949), p. 164, case No. 44); in Austria, in *Holubek v. Government of the United States* (1961) (*Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; *International Law Reports*, vol. 40 (1970), p. 73); in Canada in *Carrato v. United States of America* (1982) (141 D.L.R. (3d), p. 456. Ontario High Court; *Canadian Yearbook of International Law*, vol. XXII, p. 403 (1984)); and in the United States in *Tel-Oren v. Libyan Arab Republic, United States Brief Submitted to Supreme Court in Response to Court's Invitation in Reviewing Petition for a Writ of Certiorari* (*International Legal Materials*, vol. 24, p. 427 (1985)).

166/ Examples include the various status of forces agreements and international conventions on civil aviation or on the carriage of goods by sea.

damaging act or omission physically present therein at the time, and for which a State is answerable under the law of the State of the forum, which is also the lex loci delicti commissi.

(10) The Commission has added on second reading the word "pecuniary" before "compensation" to clarify that the word "compensation" did not include any non-pecuniary forms of compensation. The words "author of the act" should be understood to refer to agents or officials of a State exercising their official functions and not necessarily the State itself as a legal person. The expression "attributable to the State" is also intended to establish a distinction between acts by such persons which are not attributable to the State and those which are attributable to the State. The reference to act or omission attributable to the State, however, does not affect the rules of State responsibility. It should be emphasized that the present article does not address itself to the question of State responsibility but strictly to non-immunity of a State from jurisdiction before a court of another State in respect of damage caused by an act or omission of the State's agents or employees which is "alleged" to be attributable to that State; the determination of attribution or responsibility of the State concerned is clearly outside the scope of the present article. Neither does it affect the question of diplomatic immunities, as provided in article 3, nor does it apply to situations involving armed conflicts.

(11) Some members expressed reservations about the very broad scope of the article and on the consequences that might have for State responsibility. In their view, the protection of individual victims would effectively be secured by negotiations through diplomatic channels or by insurance.

Article 13

Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or

(c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding-up.

Commentary

(1) Article 13 deals with an important exception to the rule of State immunity from the jurisdiction of a court of another State quite apart from State immunity in respect of its property from attachment and execution. It is to be recalled that, under article 6, paragraph 2 (b), [167] State immunity may be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control. Article 13 is therefore designed to set out an exception to the rule of State immunity. The provision of article 13 is, however, without prejudice to the privileges and immunities enjoyed by a State under international law in relation to property of diplomatic missions and other representative offices of a government, as provided under article 3.

(2) This exception, which has not encountered any serious opposition in the judicial and governmental practice of States, [168] is formulated in language

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[167] See article 6 and the commentary thereto.

[168] See the fifth report of the former Special Rapporteur (Yearbook ... 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1, paras. 116-140). For judicial decisions, reference may be made to the decision of a Tokyo court in Limbin Hteik Tin Lat v. Union of Burma (1954) and to the dictum of the court (ibid., para. 117), as well as to the dictum of Lord Denning, Master of the Rolls, in Thai-Europe Tapioca Service Ltd v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies (1975) (ibid., para. 118). For the English doctrine of trust, see the cases cited in paras. 120-122 of the fifth report. The case law of other countries has also recognized this exception, especially Italian case law (ibid., para. 122). See, however, the decision of a Brazilian court in Republic of Syria v. Arab Republic of Egypt (Supreme Court, undated) referred to in note 117 above.

For relevant legislative provisions, reference may be made to section 56 of Hungary's Law Decree No. 13 of 1979 (ibid., para. 125), to article 29 of Madagascar's Ordinance No. 62-041 of 19 September 1962 (ibid., para. 126), to section 14 of Australia's Foreign States Immunities Act of 1985 and to the replies to the Secretariat's questionnaire (ibid., paras. 127-128). See also for other legislative provisions, international conventions and international which has to satisfy the differing views of Governments and differing theories regarding the basis for the exercise of jurisdiction by the courts of another State in which, in most cases, the property - especially immovable property - is situated. According to most authorities, article 13 is a clear and well-established exception, while others may still hold that it is not a true exception since a State has a choice to participate in the proceeding to assert its right or interest in the property which is the subject of adjudication or litigation.

(3) Article 13 lists the various types of proceedings relating to or involving the determination of any right or interest of a State in, or its possession or use of, movable or immovable property, or any obligation arising out of its interest in, or its possession or use of, immovable property. It is not intended to confer jurisdiction on any court where none exists. Hence the expression "which is otherwise competent" is used to specify the existence of competence of a court of another State in regard to the proceeding. The word "otherwise" merely suggests the existence of jurisdiction in normal circumstances had there been no question of State immunity to be determined. It is understood that the court is competent for this purpose by virtue of the applicable rules of private international law.

(4) Paragraph (a) deals with immovable property and is qualified by the phrase "situated in the State of the forum". This subparagraph as a whole does not give rise to any controversy owing to the generally accepted predominance of the applicability of the lex situs and the exclusive competence of the forum rei sitae. However, the expression "right or interest" in this paragraph gives rise to some semantic difficulties. The law of property, especially real property or immovable property, contains many peculiarities and niceties within each municipal legal system. Thus the combination of "right or interest" is used as a term to indicate the totality of whatever right or interest a State may have under any legal system. The French text of the 1972 European Convention on State Immunity used in article 9 the term droit in its widest sense, without the addition of intérêt. In this connection, it should also be noted that "possession" is not

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opinions (ibid., paras. 130-139). See, further, comments and observations of Governments analysed in the present Special Rapporteur's preliminary report (A/CN.4/415 and Corr.1 and 2, paras. 1, 2 and 7-9).

always considered a "right" unless it is adverse possession or possessio longi temporis, nec vi nec clam nec precario, which could create a "right" or "interest", depending on the legal terminology used in a particular legal system. The Spanish equivalent expression, as adopted, is derecho o interés.

(5) Subparagraph (b) concerns any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia. It is clearly understood that, if the proceeding involves not only movable but also immovable property situated within the territorial jurisdiction of the State of the forum, then a separate proceeding may also have to be initiated in order to determine such rights or interests before the court of the State where the immovable property is situated, i.e., the forum rei sitae.

(6) Subparagraph (c) need not concern or relate to the determination of a right or interest of the State in property, but is included to cover the situation in many countries, especially in the common-law systems, where the court exercises some supervisory jurisdiction or other functions with regard to the administration of trust property or property otherwise held on a fiduciary basis; of the estate of a deceased person, a person of unsound mind or a bankrupt; or of a company in the event of its winding-up. The exercise of such supervisory jurisdiction is purely incidental, as the proceeding may in part involve the determination or ascertainment of rights or interests of all the interested parties, including, if any, those of a foreign State. Taking into account the comments and observations of Governments as well as members of the Commission, the present subparagraph (c) combines original paragraph 1, subparagraphs (c), (d) and (e) adopted on first reading into one paragraph.

(7) Former paragraph 2, 169/ which was included in the text of the article adopted provisionally on first reading notwithstanding the contention of some members, has been deleted in view of the fact that the definition of the term "State" having been elaborated in article 2, paragraph 1 (b), the possibility of a proceeding being instituted in which the property, rights, interests or activities of a State are affected, although the State is not named as a party, has been much reduced. Even if such a case arose, that State could avoid its property, rights, interests or activities from being affected by providing prima facie evidence of its title or proof that the possession was obtained in conformity with the local law.

169/ Yearbook ... 1986, vol. II, (Part Two), p. 10.

Article 14

Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Commentary

(1) Article 14 deals with an exception to the rule of State immunity which is of growing practical importance. The article is concerned with a specialized branch of internal law in the field of intellectual or industrial property. It covers wide areas of interest from the point of view of the State of the forum in which such rights to industrial or intellectual property are protected. In certain specified areas of industrial or intellectual property, measures of protection under the internal law of the State of the forum are further strengthened and reinforced by international obligations contracted by States in the form of international conventions. 170/

(2) The exception provided in article 14 appears to fall somewhere between the exception of "commercial transactions" provided in article 10 and that of "ownership, possession and use of property" in article 13. The protection afforded by the internal system of registration in force in various States is designed to promote inventiveness and creativity and, at the same time, to regulate and secure fair competition in international trade. An infringement of a patent of invention or industrial design or of any copyright of literary

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170/ See, for example, the Universal Copyright Convention revised at Paris on 24 July 1971 (United Nations, Treaty Series, vol. 943, p. 178). There is also a United Nations specialized agency, the World Intellectual Property Organization (WIPO), involved in this field.

or artistic work may not always have been motivated by commercial or financial gain, but invariably impairs or entails adverse effects on the commercial interests of the manufacturers or producers who are otherwise protected for the production and distribution of the goods involved. "Intellectual and industrial property" in their collective nomenclature constitute a highly specialized form of property rights which are intangible or incorporeal, but which are capable of ownership, possession or use as recognized under various legal systems.

(3) The terms used in the title of article 14 are broad and generic expressions intended to cover existing and future forms, types, classes or categories of intellectual or industrial property. In the main, the three principal types of property that are envisaged in this article include: patents and industrial designs which belong to the category of industrial property; trade marks and trade names which pertain more to the business world or to international trade and questions relating to restrictive trade practices and unfair trade competition (concurrence déloyale); and copyrights or any other form of intellectual property. The generic terms employed in this article are therefore intended to include the whole range of forms of intellectual or industrial property which may be identified under the groups of intellectual or industrial property rights, including, for example, a plant breeder's right and a right in computer-generated works. Some rights are still in the process of evolution, such as in the field of computer science or other forms of modern technology and electronics which are legally protected. Such rights are not readily identifiable as industrial or intellectual. For instance, hardware in a computer system is perhaps industrial, whereas software is more clearly intellectual, and firmware may be in between. Literary and culinary arts, which are also protected under the name of copyright, could have a separate grouping as well. Copyrights in relation to music, songs and the performing arts, as well as other forms of entertainment, are also protected under this heading.

(4) The rights in industrial or intellectual property under the present draft article are protected by States, nationally and also internationally. The protection provided by States within their territorial jurisdiction varies according to the type of industrial or intellectual property in question and

the special regime or organized system for the application, registration or utilization of such rights for which protection is guaranteed by domestic law.

(5) The voluntary entrance by a State into the legal system of the State of the forum, for example by submitting an application for registration of, or registering a copyright, as well as the legal protection offered by the State of the forum, provide a strong legal basis for the assumption and exercise of jurisdiction. Protection is generally consequential upon registration, or even sometimes upon the deposit or filing of an application for registration. In some States, prior to actual acceptance of an application for registration, some measure of protection is conceivable. Protection therefore depends on the existence and scope of the national legislation, as well as on a system of registration. Thus, in addition to the existence of appropriate domestic legislation, there should also be an effective system of registration in force to afford a legal basis for jurisdiction. The practice of States appears to warrant the inclusion of this article. 171/

(6) Subparagraph (a) of article 14 deals specifically with the determination of any rights of the State in a legally protected intellectual or industrial property. The expression "determination" is here used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent of such rights.

171/ Domestic legislation adopted since 1970 supports this view; see section 7 of the United Kingdom State Immunity Act 1978 (see note 161 above); section 9 of the Singapore's State Immunity Act, 1979 (ibid.); section 8 of Pakistan's State Immunity Ordinance, 1981 (ibid.); section 8 of South Africa's Foreign States Immunities Act, 1981 (ibid.); section 15 of Australia's Foreign States Immunities Act of 1985 (ibid.). The United States Foreign Sovereign Immunities Act of 1976 (United States Code, 1976 Edition, vol. 8, title 28, chap. 97, p. 206; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 55 et seq.) contains no direct provision on this. Section 1605 (a) (2) of the Act may in fact be said to have overshadowed, if not substantially overlapped, the use of copyrights and other similar rights. The 1972 European Convention on State Immunity (see note 41 above), in its article 8, supports the above view. A leading case in support of this view is the decision of the Austrian Supreme Court in Dralle v. Republic of Czechoslovakia (1950) (Osterreichische Juristen Zeitung (Vienna), vol. 5 (1950), p. 341, case No. 356; International Law Reports, 1950, vol. 17 (1956), p. 155, case No. 41; Journal du droit international (Clunet) (Paris), vol. 77 (1950), p. 749; reproduced (in English) in United Nations, Materials on Jurisdictional Immunities ..., pp. 183 et seq.).

(7) Furthermore, the proceeding contemplated in article 14 is not confined to an action instituted against the State or in connection with any right owned by the State, but may also concern the rights of a third person, and only in that connection would the question of the rights of the State in a similar intellectual or industrial property arise. The determination of the rights belonging to the State may be incidental to, if not inevitable for, the establishment of the rights of a third person, which is the primary object of the proceeding.

(8) Subparagraph (b) of article 14 deals with an alleged infringement by a State in the territory of the State of the forum of any such right as mentioned above which belongs to a third person and is protected in the State of the forum. The infringement under this article does not necessarily have to result from commercial activities conducted by a State as stipulated under article 10 of the present draft articles; it could also take the form of activities for non-commercial purposes. The existence of two conditions is essential for the application of this paragraph. First, the alleged infringement by a State of a copyright, etc., must materialize in the territory of the State of the forum. Secondly, such a copyright, etc., of the third person must be legally protected in the State of the forum. Hence there is a limit to the scope of the application of the article. Infringement of a copyright by a State in its own territory, and not in the State of the forum, does not establish a sufficient basis for jurisdiction in the State of the forum under this article.

(9) Article 14 expresses a residual rule and is without prejudice to the rights of States to formulate their own domestic laws and policies regarding the protection of any intellectual or industrial property in accordance with relevant international conventions to which they are parties and to apply them domestically according to their national interests. It is also without prejudice to the extraterritorial effect of nationalization by a State of intellectual or industrial property within its territory. The question of the precise extent of the extraterritorial effects of compulsory acquisition, expropriation or other measures of nationalization brought about by the State in regard to such rights within its own territory in accordance with its internal laws is not affected by the provision of the present articles.

(10) It should be observed that the application of the exception to State immunity in subparagraph (b) of this article is confined to infringements

occurring in the State of the forum. Every State is free to pursue its own policy within its own territory. Infringement of such rights in the territory of another State, for instance the unauthorized reproduction or distribution of copyrighted publications, cannot escape the exercise of jurisdiction by the competent courts of that State in which measures of protection have been adopted. The State of the forum is also equally free to tolerate or permit such infringements or to deny remedies thereof in the absence of an internationally organized system of protection for the rights violated or breached in its own territory.

Article 15

Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Commentary

(1) Article 15 contains an exception to the rule of jurisdictional immunity of a State in a proceeding before the courts of another State relating to the participation by the State in a company or other collective body which has been established or has its seat or principal place of business in the State of the forum. Such a body in which the State participates may be incorporated, i.e. with a legal personality, or unincorporated with limited legal capacity.

(2) The expression "company or other collective body, whether incorporated or unincorporated", used in article 15, has been deliberately selected to cover a wide variety of legal entities as well as other bodies without legal

personality. The formulation is designed to include different types or categories of bodies, collectivities and groupings known under different nomenclatures, such as corporations, associations, partnerships and other similar forms of collectivities which may exist under various legal systems with varying degrees of legal capacity and status.

(3) The collective body in which the State may thus participate with private partners or members from the private sector may be motivated by profit-making, such as a trading company, business enterprise or any other similar commercial entity or corporate body. On the other hand, the State may participate in a collective body which is inspired by a non-profit-making objective, such as a learned society, a temple, a religious congregation, a charity or charitable foundation, or any other similar philanthropic organization.

(4) Article 15 is thus concerned with the legal relationship within the collective body or the corporate relations - more aptly described in French as rapports sociétaires - or legal relationship covering the rights and obligations of the State as participant in the collective body in relation to that body, on the one hand, and in relation to other participants in that body on the other.

Paragraph 1

(5) The rule of non-immunity as enunciated in paragraph 1 depends in its application upon the concurrence or coexistence of two important conditions. First, the body must have participants other than States or international organizations; in other words, it must be a body with participation from the private sector. Thus international organizations and other forms of collectivity which are composed exclusively of States and/or international organizations without participation from the private sector are excluded from the scope of article 15.

(6) Secondly, the body in question must be incorporated or constituted under the law of the State of the forum, or have its seat or principal place of business in that State. The seat is normally the place from which the entity is directed; and the principal place of business means the place where the major part of its business is conducted. The reference to the place of control which appeared in the English text of paragraph 1 (b) provisionally adopted on first reading has been deleted, as it was felt that the issue of determination of how a State is in control of a corporate entity was a very

controversial one. The reference is replaced by another criterion more easily identifiable, namely the "seat" of the corporate entity, which is also used in article 6 of the European Convention on State Immunity.

(7) When a State participates in a collective body, such as by acquiring or holding shares in a company or becoming a member of a body corporate which is organized and operated in another State, it voluntarily enters into the legal system of that other State and into a relationship recognized as binding under that legal system. Consequently, the State is of its own accord bound and obliged to abide by the applicable rules and internal law of the State of incorporation, of registration or of the principal place of business. The State also has rights and obligations under the relevant provisions of the charter of incorporation, articles of association or other similar instruments establishing limited or registered partnerships. The relationship between shareholders inter se or between shareholders and the company or the body of any form in matters relating to the formation, management, direction, operation, dissolution or distribution of assets of the entity in question is governed by the law of the State of incorporation, of registration or of the seat or principal place of business. The courts of such States are best qualified to apply this specialized branch of their own law.

(8) It has become increasingly clear from the practice of States 172/ that matters arising out of the relationship between the State as participant in a collective body and that body or other participants therein fall within the areas covered by this exception to the rule of State immunity. To sustain the

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172/ Recent national legislation on jurisdictional immunities of States may be cited in support of this exception. See, for example, section 8 of the United Kingdom's 1978 Act (The Public General Acts, 1978, part 1, chap. 33, p. 715; reproduced in United Nations, Materials on Jurisdictional Immunities ...., pp. 41 et seq.); section 10 of Singapore's 1979 Act (ibid.); section 9 of Pakistan's 1981 Ordinance (ibid.); section 9 of South Africa's 1981 Act (ibid.); and section 16 of Australia's 1985 Foreign Immunities Act.

This exception appears to have been included in the broader exception of trade or commercial activities conducted or undertaken in the State of the forum provided in the United States of America's 1976 Act (The United States Code, 1976 Edition, vol. 8, title 28, chap. 97, p. 206; reproduced in United Nations, Materials on Jurisdictional Immunities...., pp. 55 et seq.), section 1605 (a) (2), in the 1972 European Convention (see note 41 above), and in the Inter-American Draft Convention on Jurisdictional Immunity of States (OEA/Ser.G-CP/doc.1352/83 of 30 March 1983).

rule of State immunity in matters of such a relationship would inevitably result in a jurisdictional vacuum. One of the three links based on substantial territorial connection with the State of the forum must be established to warrant the assumption and exercise of jurisdiction by its courts. These links are: the place of incorporation indicating the system of incorporation, charter or other type of constitution or the seat or the principal place of business (siège social ou statutaire).

Paragraph 2

(9) The exception regarding the State's participation in companies or other collective bodies as provided in paragraph 1 is subject to a different or contrary agreement between the States concerned, namely the State of the forum, which in this case is also the State of incorporation or of the seat or principal place of business, on the one hand, and the State against which a proceeding is instituted on the other. This particular reservation had originally been placed in paragraph 1, but was moved to paragraph 2 on second reading, with a view to setting out clearly the general rule of non-immunity in paragraph 1 and consolidating all the reservation clauses in paragraph 2. Paragraph 2 also recognizes the freedom of the parties to the dispute to agree contrary to the rule of non-immunity as enunciated in paragraph 1. Furthermore, parties to the corporate relationship (rapports sociétaires) may themselves agree that the State as a member or participant continues to enjoy immunity or that they may choose or designate any competent courts or procedures to resolve the differences that may arise between them or with the body itself. In particular, the instrument establishing or regulating that body itself may contain provisions contrary to the rule of non-immunity for the State, in its capacity as a member, shareholder or participant, from the jurisdiction of the courts so chosen or designated. Subscription by the State to the provisions of the instrument constitutes an expression of consent to abide by the rules contained in such provisions, including the choice of law or jurisdiction. The phrase "the instrument establishing or regulating the body in question" should be understood as intending to apply only to the two fundamental instruments of a corporate body and not to any other type of regulation.

Article 16

Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship, if at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to other ships owned or operated by a State and used exclusively on government non-commercial service.

3. For the purposes of this article, "proceeding which relates to the operation of that ship" means, *inter alia*, any proceeding involving the determination of a claim in respect of:

(a) collision or other accidents of navigation;

(b) assistance, salvage and general average;

(c) repairs, supplies or other contracts relating to the ship;

(d) consequences of pollution of the marine environment.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2 nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Commentary

(1) Draft article 16 is concerned with a very important area of maritime law as it relates to the conduct of external trade. It is entitled "Ships owned or operated by a State". The expression "ship" in this context should be interpreted as covering all types of seagoing vessels, whatever their nomenclature and even if they are engaged only partially in seagoing traffic. It is formulated as a residual rule, since States can always conclude agreements or arrangements 173/ allowing, on a reciprocal basis or otherwise, for the application of jurisdictional immunities in respect of ships in commercial service owned or operated by States or their agencies.

(2) Paragraphs 1 and 3 are mainly concerned with ships engaged in commercial service, paragraph 2 mainly with warships and naval auxiliaries and paragraphs 4 and 5 with the status of cargo. Paragraph 4 enunciates the rule of non-immunity in proceedings relating to the carriage of cargo on board a ship owned or operated by a State and used for other than government non-commercial service. Paragraph 5 maintains State immunity in respect of any cargo carried on board the ships referred to in paragraph 2 as well as of any cargo belonging to a State and used or intended for use exclusively for government non-commercial purposes.

(3) The difficulties inherent in the formulation of rules for the exception provided for under article 16 are manifold. They are more than linguistic. The English language presupposes the employment of terms that may be in current usage in the terminology of common law but are unknown to and have no equivalents in other legal systems. Thus the expressions "suits in

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173/ See, for example, the Protocol of 1 March 1974 to the Treaty of Merchant Navigation of 3 April 1968 between the United Kingdom and the Soviet Union (United Kingdom, Treaty Series No. 104 (1977)). See also the treaties on maritime navigation concluded between the Soviet Union and the following States: France, Maritime Agreement of 20 April 1967 (art. 14) (United Nations, Treaty Series, vol. 1007, p. 183); Netherlands, Agreement of 28 May 1969 concerning shipping (art. 16) (ibid., vol. 815, p. 159); Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Agreement of 3 December 1971 on cooperation with regard to maritime merchant shipping (art. 13) (ibid., vol. 936, p. 19); Algeria, Agreement of 18 April 1973 concerning maritime navigation (art. 16) (ibid., vol. 990, p. 211); Iraq, Agreement of 25 April 1974 on maritime merchant shipping (art. 15); Portugal, Agreement of 20 December 1974 on maritime navigation (art. 15). Cf. M.M. Boguslavsky, "Foreign State immunity: Soviet doctrine and practice", Netherlands Yearbook of International Law (Alphen aan den Rijn), vol. X (1979), pp. 173-174.

admiralty", "libel *in rem*", "maritime lien" and "proceedings *in rem* against the ship", may have little or no meaning in the context of civil law or other non-common-law systems. The terms used in article 16 are intended for a more general application.

(4) There are also conceptual difficulties surrounding the possibilities of proceedings *in rem* against ships, for example by service of writs on the main mast of the ship, or by arresting the ship in port, or attaching it and releasing it on bond. In addition, there is a special process of arrest *ad fundandam jurisdictionem*. In some countries, it is possible to proceed against another merchant ship in the same ownership as the ship in respect of which the claim arises, on the basis of what is known as sister-ship jurisdiction, for which provision is made in the International Convention relating to the Arrest of Seagoing Ships (Brussels, 1952). [174] The present article should not be interpreted to recognize such systems as arrest *ad fundandam jurisdictionem* or sister-ship jurisdiction as a generally applicable rule. It follows that where a claim is brought against a merchant ship owned or operated by a State, another merchant ship owned or operated by the same State could not be subject to a proceeding *in rem* against it.

(5) The problem of government-owned or State-operated vessels employed in ordinary commercial activities is not new. This is apparent from the vivid account given by one author [175] and confirmed by the fact that some maritime Powers felt it necessary to convene a conference to adopt the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) [176] and its Additional Protocol (1934) [177] on the subject. The main purpose of the 1926 Brussels Convention was to reclassify seagoing vessels not according to ownership but according to the nature of their operation (*exploitation*) or their use, whether in "governmental and non-commercial" or in "commercial" service.

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[174] United Nations, *Treaty Series*, vol. 439, p. 193.

[175] See G. van Slooten, "La Convention de Bruxelles sur le statut juridique des navires d'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VII (1926), p. 453, in particular p. 457.

[176] League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

[177] Ibid., p. 214.

(6) The text of article 16 as provisionally adopted on first reading maintained the dichotomy of service of vessels, classified according to a dual criterion of "commercial and non-governmental" or "governmental and non-commercial" use. The term "governmental and non-commercial" is used in the 1926 Brussels Convention, and the term "government non-commercial" in conventions of a universal character such as the Convention on the High Seas (Geneva, 1958) 178/ and the 1982 United Nations Convention on the Law of the Sea, 179/ in which ships are classified according to their use, i.e. government and non-commercial service as opposed to commercial service.

(7) Some members of the Commission at the time of adopting the article on first reading expressed misgivings concerning that dual criterion, as it might suggest the possibility of a very different combination of the two adjectives, such as "governmental commercial" service or "commercial and governmental" service. Other members, on the other hand, denied the likelihood of that interpretation, and considered that "commercial" and "non-governmental" could be taken cumulatively. Others again added that States, particularly developing countries, and other public entities could engage in activities of a commercial and governmental nature without submitting to the jurisdiction of national courts. Furthermore, the purchase of armaments was often concluded on a government-to-government basis, including the transport of such armaments by any type of carrier, which would not normally be subject to the exercise of jurisdiction by any national court. The diversity of views led the Commission to maintain square brackets round the phrase "non-governmental" in paragraphs 1 and 4 of the draft article on first reading.

(8) The Commission, after further discussion, adopted on second reading the present formulation "other than government non-commercial purposes" in paragraphs 1 and 4, thereby eliminating the problem of dual criterion.

178/ United Nations, Treaty Series, vol. 450, p. 11.

179/ Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.34.V.3), p. 157, document A/CONF.62/122.

(9) The words "operate" (*exploiter*) and "operation" (*exploitation*) in paragraph 1 must be understood against the background of the 1926 Brussels Convention and existing State practice. Both terms refer to the exploitation or operation of ships in the transport of goods and passengers by sea. The carriage of goods by sea constitutes an important subject in international trade law. Its study has been undertaken by UNCITRAL, and a standard convention or legislation on maritime law or the law of carriage of goods by sea [180] has been proposed to serve as a model for developing countries which are contemplating national legislation on the subject. The subject covers a wide field of maritime activities, from organization of the merchant marine, construction and building of a merchant fleet, training of master and crew, establishment of forwarding and handling agents, and taking of marine insurance. More generally known are questions relating to the liabilities of carriers for the carriage of dangerous goods or of animals, the discharge of oil off-shore away from the port, collision at sea, salvage and repair, general average, seamen's wages, maritime liens and mortgages. The concept of the operation of merchant ships or ships engaged in commerce is given some clarification by way of illustration in paragraph 3. The expression "a State which operates a ship" covers also the "possession", "control", "management" and "charter" of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise.

(10) A State owning a ship, but allowing a separate entity to operate it, could still be proceeded against owing to the special nature of proceedings *in rem* or in admiralty or maritime lien which might be provided for in some common-law countries, and which were directed to all persons having an interest in the ship or cargo. In practice, a State owning a ship but not operating it should not otherwise be held liable for its operation at all, as the corporation or operating entity exists to answer for all liabilities arising out of the operation of that ship. The provision of paragraph 1 should be interpreted that in a case where a ship is owned by a State but

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[180] See the 1978 United Nations Convention on the Carriage of Goods by Sea (*Yearbook of the United Nations Commission on International Trade Law*, vol. IX (1978) (United Nations publication, Sales No. E.80.V.8), p. 212).

operated by a State enterprise which has independent legal personality, it is the ship-operating State enterprise and not the State owning the ship that would become subject to jurisdiction before the court of the forum State. It may be also said that it should be possible to allow actions to proceed relating to the operation of the ship without involving the State or its claim for jurisdictional immunity. There seemed to be no need in such a case to institute a proceeding in personam against the State owning the ship as such, particularly if the cause of action related to its operation, such as collision at sea, general average, or carriage of goods by sea. But if the proceeding related to repairs or salvage services rendered to the ship, it might be difficult in some legal systems to imagine that the owner did not benefit from the repairs or services rendered and that the operator alone was liable. If such an eventuality occurred, a State owning but not operating the vessel could allow the operator, which is in many cases a State enterprise, to appear in its place to answer the complaint or claim made. The practice is slowly evolving in this direction through bilateral arrangements.

(11) Paragraph 2 enunciates the rule of State immunity in favour of warships and naval auxiliaries, even though such vessels may be employed occasionally for the carriage of cargoes for such purposes as to cope with an emergency or other natural calamities. Immunity is also maintained for other government ships such as police patrol boats, customs inspection boats, hospital ships, oceanographic survey ships, training vessels and dredgers, owned or operated by a State and used or intended for use in government non-commercial service. A similar provision is found in article 3 of the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels. The word "exclusively" was introduced on second reading in line with article 96 of the 1982 Convention on the Law of the Sea. Some members, however, expressed reservations about the retention of the second half of the text beginning with the words "nor does it apply" on the ground that the reference to "other ships owned or operated by a State and used exclusively on government non-commercial service", was unnecessary and illogical in light of the provision of paragraph 1. One member also expressed reservations about the use of the word "service" in paragraph 2, stating that it should be replaced by the word "purposes" as in paragraph 1; since paragraph 2 forms a consequential provision of paragraph 1, it would be confusing to use different terms for those corresponding provisions.

(12) It is important to note that paragraphs 1, 2 and 4 apply to "use" of the ship. The application of the criterion of use of the ship, which is actual and current is thus clarified. The criterion of intended use, which was included in the text adopted provisionally on first reading, has been eliminated, for paragraph 1 presupposes the existence of a cause of action relating to the operation of the ship and such a cause of action is not likely to arise if the ship is not actually in use. The Commission therefore retained on second reading only the criterion of actual use, all the more because the criterion of intended use was considered very vague and likely to give rise to difficulties in practice. For the same reason, the criterion of intended use has been eliminated also from paragraphs 2 and 4. Some members, however, expressed reservations about the deletion of that criterion. One member pointed out that State A could order from a shipbuilding yard in a State B a ship intended for commercial use. After its construction, the ship would sail from a port in State B to a port in State A, during which the ship, though intended for commercial purposes, would not be actually used for carriage of cargo. In his view, deletion of "intended for use", therefore created a lacuna in that respect.

(13) The expression "before a court of another State which is otherwise competent in any proceeding" is designed to refer back (*renvoyer*) to the existing jurisdiction of the courts competent under the internal law, including the maritime law, of the forum State, which may recognize a wide variety of causes of action and may allow a possible choice of proceedings, such as *in personam* against the owner and operator or *in rem* against the ship itself, or suits in admiralty or actions to enforce a maritime lien or to foreclose a mortgage. A court may be competent on a variety of grounds, including the presence of the ship at a port of the forum State, and it need not be the same ship as the one that caused damage at sea or had other liabilities but a similar merchant ship belonging to the same owner. Courts in common-law systems generally recognize the possibility of arrest or seizure of a sister ship *ad fundandam jurisdictionem*, but once bond is posted the ship would be released and the proceedings allowed to continue. As stated earlier, however, the present article should not be interpreted to recognize this common law practice as a universally applicable practice. Thus the expression "any proceeding" refers to "any type of proceeding", regardless of its nature, whether *in rem*, *in personam*, in admiralty or otherwise. The rules enunciated

in paragraphs 1 and 2 are supported by State practice, both judicial, legislative and governmental, as well as by multilateral and bilateral treaties. 181/

(14) Paragraph 3 sets out some examples of the proceedings which relate to the operation of ships "used for other than government non-commercial purposes" under paragraph 1. Paragraph 3 (d) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail. Since subparagraph (d), like subparagraphs (a) to (c), serves merely as an example of the claims to which the provisions of paragraph 1 would apply, it does not affect the substance or scope of the exception to State immunity under paragraph 1. Nor does the subparagraph establish substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be

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181/ See the sixth report of the former Special Rapporteur, Yearbook ... 1984, vol. II (Part One), pp. 30 et seq., document A/CN.4/376 and Add.1 and 2, paras. 136-230.

See also for recent legislative practice, South Africa Foreign States Immunities Act of 1981 (section 11); United States Act to amend the Foreign Sovereign Immunities Act with respect to admiralty jurisdiction, 1988, Public Law 100-640, 102 Stat. 3333 (Section 1605 (b), as amended, and Section 1610 as amended).

For the recent judicial practice see, for example, Canada: Lorac Transport Ltd. v. The Ship "Atra" (1984) (9 D.L.R. (4th) 129. Federal Court, Trial Division. Canadian Yearbook of International Law, vol. XXIII, pp. 417-18 (1985); the Netherlands: USSR v. I.C.C. Handel-Maatschappij (see note 156 above); the United States of America: Transamerican Steamship Corp. v. Somali Democratic Republic (767 F.2d, p. 998. U.S. Court of Appeals, D.C. Cir., 12 July 1985, The American Journal of International Law, vol. 80, p. 357 (1986)); China National Chemical Import and Export Corporation and Another v. M/V Lago Hualaihue and Another (District Court, Maryland. 6 January 1981, International Law Reports, vol. 63, (1982) p. 528).

decided by the competent court. The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible loss or damage to the claimant. One member, indeed, considered that a more qualified wording such as "injurious consequences" would have been necessary and he therefore reserved his position on the subparagraph. Some other members, on the other hand, felt that this concern was unjustified since no frivolous or vexatious claims would be entertained by a court and that furthermore it was not the function of rules of State immunity to prevent claims on the basis of their merits.

(15) Paragraph 4 provides for the rule of non-immunity applicable to a cargo belonging to a State and used or intended for use for commercial non-governmental purposes. Paragraph 5 is designed to maintain immunity for any cargo, commercial or non-commercial, carried on board the ships referred to in paragraph 2, as well as for any cargo belonging to a State and used, or intended for use, in government non-commercial service. This provision maintains immunity for, inter alia, cargo involved in emergency operations such as food relief or transport of medical supplies. It should be noted that, in paragraph 5, unlike in paragraphs 1, 2 and 4, the word "intended for use" has been retained because the cargo is not normally used while it is on board the ship and it is therefore its planned use which will determine whether the State concerned is or is not entitled to invoke immunity.

(16) Paragraphs 6 and 7 apply to both ships and cargoes and are designed to strike an appropriate balance between the State's non-immunity under paragraphs 1 and 4 and a certain protection to be afforded the State. Paragraph 6 reiterates that States owning or operating ships engaged in commercial service may invoke all measures of defence, prescription and limitation of liability that are available to private ships and cargoes and their owners. The rule enunciated in paragraph 6 is not limited in its application to proceedings relating to ships and cargoes. States may plead all available means of defence in any proceedings in which State property is involved. Paragraph 7 indicates a practical method for proving the government and non-commercial character of the ship or cargo, as the case may be, by a certificate signed in normal circumstances by the accredited diplomatic representative of the State to which the ship or cargo belongs. In the

absence of an accredited diplomatic representative, a certificate signed by another competent authority, such as the Minister of Transport or the consular officer concerned, shall serve as evidence before the court. The communication of the certificate to the court will of course be governed by the applicable rules of procedure of the forum State. The words "shall serve as evidence" does not however refer to irrebuttable evidence.

(17) Article 16 does not deal with the issue of immunity of States in relation to aircraft or space objects. Hence it cannot be applied to aircraft or space objects. 182/

182/ This issue was discussed in the Drafting Committee and referred to in the Commission (see A/CN.4/SR.2221).

Treaties relating to international civil aviation law include the following:

(a) Convention on International Civil Aviation, Chicago, 1944 (see, in particular, Chapters I and II) (ICAO, document 7300/6);

(b) Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929 (see arts. 1, 2 and the Additional Protocol) (League of Nations, Treaty Series, vol. CXXXVII, p. 16 and United Nations, Treaty Series, vol. 478, p. 371);

(c) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, The Hague, 1955 (see art. XXVI) (ICAO, document 7632);

(d) Convention supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Guadalajara, 1961 (ICAO, see document 8181);

(e) Convention on the International Recognition of Rights in Aircraft, Geneva, 1948 (see arts. XI, XII and XIII) (ICAO, document 7620);

(f) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 1952 (see arts. 1, 2, 20, 23 and 26) (ICAO, document 7364);

(g) Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963 (see art. 1) (ICAO, document 8364);

Article 17

Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure; or

(c) the setting aside of the award;

unless the arbitration agreement otherwise provides.

(h) Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970 (see art. 3) (ICAO, document 8920);

(i) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971 (see art. 4) (ICAO, document 8966).

Treaties relevant to space activities and space objects incude the following:

(a) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) 1967 (United Nations, *Treaty Series*, vol. 610, p. 205);

(b) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 (General Assembly resolution 2345 (XXII));

(c) Convention on International Liability for Damage Caused by Space Objects (Liability Convention) 1972 (United Nations, *Treaty Series*, vol. 672, p. 118);

(d) Convention on Registration of Objects Launched into Outer Space 1975 (General Assembly resolution 3235 (XXIX));

(e) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (*International Legal Materials*, vol. XVIII, p. 1434); (General Assembly resolution 34/168).

Commentary

(1) Draft article 17 deals with the rule of non-immunity relating to the supervisory jurisdiction of a court of another State which is otherwise competent to determine questions connected with the arbitration agreement, such as the validity of the obligation to arbitrate or to go to arbitration or to compel the settlement of a difference by arbitration, the interpretation and validity of the arbitration clause or agreement, the arbitration procedure and the setting aside of arbitral awards. 183/

(2) The draft article as provisionally adopted on first reading included two expressions "commercial contract" and "civil or commercial matter" in square brackets as alternative confines of the exception relating to an arbitration agreement. Those expressions have now been replaced by the term "commercial transaction" in line with the provision of article 2, paragraph 1 (c).

(3) The expression "the court which is otherwise competent" in this context refers to the competence of a court, if any, to exercise supervisory jurisdiction under the internal law of the State of the forum, including in particular its rules of private international law, in a proceeding relating to the arbitration agreement. A court may be competent to exercise such supervisory jurisdiction in regard to a commercial arbitration for one or more reasons. It may be competent in normal circumstances because the seat of the arbitration is located in the territory of the State of the forum, or because

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183/ See the sixth report of the former Special Rapporteur, A/CN.4/376, paras. 247-253. See, for example, France: Court of Cassation decision in Southern Pacific Properties Ltd. et al. v. Arab Republic of Egypt (6 January 1987. International Legal Materials, vol. XXVI, p. 1004 (1987)); Societé Européenne d'Etudes et d'Entreprises v. Yugoslavia, et al. Court of Cassation (18 November 1986. English translation, International Legal Materials vol. XXVI, p. 377 (1986)). See also, Switzerland: Decisions of the Court of Justice of Geneva and the Federal Tribunal (Excerpts) Concerning Award in Westland Helicopters Arbitration (19 July 1988. Translation in International Legal Materials, vol. XXVIII, p. 687 (1989)).

See further the United States Foreign Sovereign Immunities Act of 1976, as amended in 1988; the United States has since adopted an Act to Implement the Inter-American Convention on International Commercial Arbitration of 1988, Public Law 100-669, 102 Stat. 3969, amending sections 1605 (a) and 1610 (a) of the United States Foreign Sovereign Immunities Act.

the parties to the arbitration agreement have chosen the internal law of the forum as the applicable law of the arbitration. It may also be competent because the property seized or attached is situated in the territory of the forum.

(4) It should be pointed out in this connection that it is the growing practice of States to create conditions more attractive and favourable for parties to choose to have their differences arbitrated in their territory. One of the attractions is an endeavour to simplify the procedures of judicial control. Thus the United Kingdom and Malaysia have amended their legislation regarding supervisory jurisdiction applicable to arbitration in general. The fact remains that, in spite of this trend, many countries, such as Thailand and Australia, continue to maintain more or less strict judicial control or supervision of arbitration in civil, commercial and other matters taking place within the territory of the forum State. Thus it is possible, in a given instance, either that the court which is otherwise competent may decline to exercise supervisory jurisdiction, or that it may have its jurisdiction restricted as a result of new legislation. Furthermore, the exercise of supervisory jurisdiction may have been excluded, at least in some jurisdictions, by the option of the parties to adopt an autonomous type of arbitration, such as the arbitration of the International Centre for Settlement of Investment Disputes (ICSID) or to regard arbitral awards as final, thereby precluding judicial intervention at any stage. The proviso "unless the arbitration agreement otherwise provides" is designed to cover the option freely expressed by the parties concerned which may serve to take the arbitration procedure out of domestic judicial control. Some courts may still insist on the possibility of supervision or control over arbitration despite the expression of unwillingness on the part of the parties. In any event, agreements to arbitrate are binding on the parties thereto, although their enforcement may have to depend, at some point, on judicial participation.

(5) For the reasons indicated, submission to commercial arbitration under this article constitutes an expression of consent to all the consequences of acceptance of the obligation to settle differences by the type of arbitration clearly specified in the arbitration agreement. Normally, the relevant procedural matters - for example the venue and the applicable law - are laid down in the arbitration agreement. Thus, the court which was appointed

pursuant to such an agreement would deal with the question of immunity rather than the court of any other State, and the arbitration procedure prescribed in the arbitration agreement would govern such matters as referred to in subparagraphs (a)-(c). It is merely incidental to the obligation to arbitrate undertaken by a State that a court of another State, which is otherwise competent, may be prepared to exercise its existing supervisory jurisdiction in connection with the arbitration agreement, including the arbitration procedure and other matters arising out of the arbitration agreement or compromissary clause.

(6) Consent to arbitration is as such no waiver of immunity from the jurisdiction of a court which would otherwise be competent to decide the dispute or difference on the merits. However, consenting to a commercial arbitration necessarily implies consent to all the natural and logical consequences of the commercial arbitration contemplated. In this limited area only, it may therefore be said that consent to arbitration by a State entails consent to the exercise of supervisory jurisdiction by a court of another State, competent to supervise the implementation of the arbitration agreement.

(7) It is important to note that the draft article refers to "arbitration agreement" between a State and a foreign natural or juridical person, and not between States themselves or between States and international organizations. Also excluded from this article are the types of arbitration provided by treaties between States 184/ or those that bind States to settle differences between themselves and nationals of other States, such as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 1965), 185/ which is self-contained and autonomous, and contains provisions for execution of the awards. This does not prevent States and international organizations from concluding arbitration agreements that may entail consequences of submission to the supervisory jurisdiction of the forum State.

184/ See, for example, the Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment, article 11.

185/ United Nations, Treaty Series, vol. 575, p. 159.

(8) It should also be added that, of the several types of arbitration available to States as peaceful means of settling various categories of disputes, only the type between States and foreign natural and juridical persons is contemplated in this article. Arbitration of this type may take any form, such as arbitration under the rules of the International Chamber of Commerce or UNCITRAL, or other institutionalized or ad hoc commercial arbitration. Submission of an investment dispute to ICSID arbitration, for instance, is not submission to the kind of commercial arbitration envisaged in this draft article and can in no circumstances be interpreted as a waiver of immunity from the jurisdiction of a court which is otherwise competent to exercise supervisory jurisdiction in connection with a commercial arbitration, such as an International Chamber of Commerce arbitration or an arbitration under the aegis of the American Arbitration Association. 186/

(9) The article in no way seeks to add to or detract from the existing jurisdiction of the courts of any State, nor to interfere with the role of the judiciary in any given legal system in the judicial control and supervision

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186/ See, for example, Maritime International Nominees Establishment v. Republic of Guinea (United States of America, intervenor) (1982) (Federal Reporter, 2nd Series, vol. 693 (1983), p. 1094); Guinea v. Maritime International Nominees Establishment (Belgium, Court of First Instance of Antwerp. 27 September 1985, International Legal Materials, vol. XXIV, p. 1639 (1985)); Senegal v. Seutin as Liquidator of the West African Industrial Concrete Co. (SOABI) (France, Court of Appeal of Paris. 5 December 1989. International Legal Materials, vol. XXIX, p. 1341 (1990)); Socialist Libyan Arab Popular Jamahiriya v. Libyan American Oil Company (LIAMCO) (Switzerland, Federal Supreme Court, First Public Law Department. 19 June 1980, International Law Reports, vol. 62 (1982), p. 228); Tekno-Pharma AB v. State of Iran (Sweden, Svea Court of Appeal. 24 May 1972, International Law Reports, vol. 65 (1984), p. 383); Libyan American Oil Company v. Socialist People's Arab Republic of Libya (Sweden, Svea Court of Appeals. 18 June 1980, International Law Reports, vol. 62 (1982), p. 225); Libyan American Oil Company v. Socialist People's Libyan Arab Jamahiriya, formerly Libyan Arab Republic (U.S. District Court, District of Columbia. 18 January 1980, International Law Reports, vol. 62 (1982), p. 220). See, however, Popular Revolutionary Republic of Guinea v. Atlantic Triton Company (France, Court of Cassation (First Civil Chamber). 18 November 1986, International Law Reports, vol. 82 (1990), p. 76), in which the court took the position that the exclusive character of ICSID arbitration set forth in article 26 of the ICSID Convention did not prevent a party to an ICSID proceeding from seeking in the French courts provisional measures in the form of attachment.

which it may be expected or disposed to exercise to ensure the morality and public order in the administration of justice needed to implement the arbitral settlement of differences. Only in this narrow sense is it correct to state that submission to commercial arbitration by a State entails an implied acceptance of the supervisory jurisdiction of a court of another State otherwise competent in matters relating to the arbitration agreement.

PART IV

STATE IMMUNITY FROM MEASURES OF CONSTRAINT IN CONNECTION WITH PROCEEDINGS BEFORE A COURT

(1) The first three parts - "Introduction", "General principles" and "Proceedings in which State immunity cannot be invoked" - having been completed, the draft should also contain a fourth part concerning State immunity from measures of constraint in connection with proceedings. Immunity in respect of property owned, possessed, or used by States in this context is all the more meaningful for States in view of the recent growing practice for private litigants, including multinational corporations, to seek relief through attachment of property owned, possessed or used by developing countries, such as embassy bank accounts or funds of the central bank or other monetary authority, in proceedings before the courts of industrially advanced countries.

(2) Part IV of the draft is concerned with State immunity from measures of constraint upon the use of property, such as attachment, arrest and execution, in connection with a proceeding before a court of another State. The expression "measures of constraint" has been chosen as a generic term, not a technical one in use in any particular internal law. Since measures of constraint vary considerably in the practice of States, it would be difficult, if not impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems. Suffice it, therefore, to mention by way of example the more notable and readily understood measures, such as attachment, arrest and execution. The problem of finding readily translatable terms in the official languages is indubitably multiplied by the diversity of State practice in the realm of procedures and measures of constraint.

(3) Part IV is of special significance in that it relates to a second phase of the proceedings in cases of measures of execution, as well as covering interlocutory measures or pre-trial or prejudgment measures of attachment, or seizure of property ad fundandam jurisdictionem. Part IV provides in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of the use of its property in connection with proceedings before a court of another State.

Article 18

State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

Commentary

(1) Article 18 concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding. Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Article 18 clearly defines the rule of State

immunity in its second phase, concerning property, particularly measures of execution as a separate procedure from the original proceeding.

(2) The practice of States has evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from jurisdiction. 187/ Whatever the theories, for the purposes of this article, the question of immunity from execution does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgement in favour of the plaintiff. Immunity from execution may be viewed, therefore, as the last fortress, the last bastion of State immunity. If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (*par in parem imperium non habet*), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property. Such a possibility does not exist even in international litigation, whether by judicial settlement or arbitration. 188/

(3) Article 18 is a merger and a reformulation of former articles 21 and 22 as provisionally adopted on first reading. Former article 21 dealt with State immunity from measures of constraint and former article 22 with consent to such measures. Since the ideas expressed in those two articles were closely

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187/ See the jurisprudence cited in the former Special Rapporteur's seventh report, (*Yearbook ... 1985*, vol. II (Part One) document A/CN.4/388 paragraphs 73-77. See also the second report of the present Special Rapporteur, document A/CN.4/422 and Corr.1, paragraphs 26-28. Citing Schreuer (*State Immunity: Some Recent Developments*, 1988 p. 125), the Special Rapporteur observed that there were some writers who argued that allowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution might put them into the doubly frustrating position of being left with an unenforceable judgement with expensive legal costs, although the majority views of Governments as well as writers were that immunity from measures of constraint was separate from the jurisdictional immunity of a State (para. 26).

188/ See, for example, in the *Socobelge* case, the judgement of the Permanent Court of International Justice of 15 June 1939 concerning the arbitral awards of 3 January and 25 July 1936 (*P.C.I.J. Series A/B, No. 78* p. 160) and the decision of 30 April 1951 of the Tribunal civil of Brussels (*Journal de droit international* (Clunet) (Paris), vol. 79 (1952), p. 244).

related, the Commission agreed to the proposal of the Special Rapporteur for the merger, which was supported by many members as well as Governments. In this manner, the principle of non-execution against the property of a State at any stage or phase of proceedings is clearly set out, followed by the exceptions to that principle.

Paragraph 1

(4) The measures of constraint mentioned in this article are not confined to execution but cover also attachment and arrest, as well as other forms of saisie, saisie-arrêt and saisie-exécution, including enforcement of arbitral award, sequestration and interim, interlocutory and all other prejudgment conservatory measures, intended sometimes merely to freeze assets in the hands of the defendant. The measures of constraint indicated in paragraph 1 are illustrative and non-exhaustive.

(5) The property protected by immunity under this article is State property, including, in particular, property defined in article 19. The original text of the chapeau of former article 21 and of paragraph 1 of former article 22 as provisionally adopted on first reading contained the phrase [, or property in which it has a legally protected interest,], over which there were differences of view among members of the Commission. In their written submissions, a number of Governments criticized the phrase as being vague and permitting a broadening of the scope of immunity from execution. The bracketed phrase was therefore deleted and replaced by the words "property of a State".

(6) The word "State" in the expression "proceeding before a court of another State" refers to the State where the property is located, regardless of where the substantive proceeding takes place. Thus, before any measures of constraint are implemented, a proceeding to that effect should be instituted before a court of the State where the property is located. Of course, in some special circumstances, such as under a treaty obligation, no further court proceeding may be required for execution once there is a final judgement by a court of another State party to the treaty.

(7) The principle of immunity here is subject to three conditions, the satisfaction of any of which would result in non-immunity: (a) if consent to the taking of measures of constraint is given by international agreement, in an arbitration agreement or in a written contract, or by a declaration before the court or by a written communication after a dispute between the parties

has arisen; or (b) if the property has been allocated or earmarked by the State for the satisfaction of the claim; or (c) if the property is specifically in use or intended for use by the State for other than government non-commercial purposes. 189/ Subparagraph (c) further provides that, for there to be no immunity, the property must have a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed.

189/ For the case law, international opinion, treaties and national legislation dealing with immunity from measures of constraint, see the seventh report of the former Special Rapporteur (Yearbook ..... 1985, vol. II (Part One) document A/CN.4/388), paras. 33-82, and the second report of the Special Rapporteur, document A/CN.4/422 and Corr.1 paras. 26-28.

For recent legislation, see further, Australia Foreign States Immunities Act (section 30-35); South Africa Foreign States Immunities Amendment Act of 1988 (section 14 (b)); United States Act to Implement the Inter-American Convention on International Commercial Arbitration. Public Law 100-669, 100th Congress. 102 Stat. 3969.

For recent cases concerning the provision of paragraph 1 (a), see for example, with respect to the requirement of express consent by international agreement under subparagraph (i), O'Connell Machinery Co. v. MV Americana and Italia Di Navigazione, SpA (U.S. Court of Appeals, 2nd Cir. 4 May 1984, International Law Reports, vol. 81 (1990), p. 539), in which, despite an express waiver of immunity in article XXIV (6) of the Italy-United States Treaty of Friendship, Commerce and Navigation, 1965, the Court did not interpret the treaty as providing for waiver of prejudgement attachment. See also, New England Merchants National Bank v. Iran Power Generation and Transmission Co., et al. (502 F. Supp. 120. U.S. District Court, S.D.N.Y., 26 September 1980. The American Journal of International Law, vol. 75, p. 375 (1981)); E-Systems Inc. v. Islamic Republic of Iran and Bank Melli Iran (U.S. District Court, Northern District, Texas. 19 June 1980, International Law Reports, vol. 63, (1982) p. 424).

With regard to the requirement of express consent in a written contract under subparagraph (ii), see for example, Libra Bank Limited v. Banco Nacional de Costa Rica. 676 F.2d, p. 47 (1982) (U.S. Court of Appeals, 2nd Cir., 12 April 1982. Reprinted in International Legal Materials, vol. XXI, p. 618 (1982)) in which the court held that a written waiver by a foreign State of any right of immunity from suit with respect to a loan agreement constitutes an explicit waiver of immunity for prejudgement attachment for purposes of the Foreign Sovereign Immunities Act, section 1610 (d) (1). See, however, on the requirement of express consent by an arbitration agreement under subparagraph (ii), Birch Shipping Corp. v. Embassy of Tanzania (Misc. No. 80-247. U.S. District Court, District of Columbia, 18 November 1980. The American Journal of International Law, vol. 75, p. 373 (1981)) in which the

(8) The phrase "the taking of such measures, as indicated:" in paragraph 1 (a) refers to both the measures of constraint and the property. Thus express consent can be given generally with regard to measures of constraint or property, or be given for particular measures or particular property, or, indeed, be given for both measures and property.

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court found that the defendant in its submission to arbitration had implicitly agreed to waive immunity, including entry of judgement on any resulting award.

Cf. cases concerning measures of constraint in connection with the International Centre for the Settlement of Investment Disputes (ICSID) proceedings: Popular Revolutionary Republic of Guinea v. Atlantic Triton Company (France, Court of Appeal of Rennes (Second Chamber). 26 October 1984, International Law Reports, vol. 82 (1990) p. 76); Popular Revolutionary Republic of Guinea v. Atlantic Triton Company (France, Court of Cassation (First Civil Chamber). 18 November 1986, International Law Reports, vol. 82 (1990), p. 76); Senegal v. Seutin as Liquidator of the West African Industrial Concrete Co. (SOABI) (France, Court of Appeal of Paris. 5 December 1989. International Legal Materials, vol. XXIX, p. 1341 (1990)); Benvenuti et Bonfant SARL v. Government of the People's Republic of The Congo (France, Court of Appeal of Paris. 26 June 1981, International Law Reports, vol. 65 (1984), p. 88); Société Ltd. Benvenuti et Bonfant c. Banque commerciale congolaise (France, Cour de cassation, 21 July 1987) (Journal du droit international, 1988, vol. 115, p. 108); Guinea v. Maritime International Nominees Establishment (Belgium, Court of First Instance of Antwerp. 27 September 1985, International Legal Materials, vol. XXIV, p. 1639 (1985)); Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia (U.S. District Court for the Southern District of New York. 12 December 1986. Reprinted in International Legal Materials, vol. XXVI, p. 695 (1987)).

For recent cases concerning the provision of paragraph 1 (c), see for example, Islamic Republic of Iran and Others v. Société Eurodif and Others (France, Court of Cassation (First Civil Chamber). 14 March 1984, International Law Reports, vol. 77 (1988), p. 513) in which the court stated that notwithstanding the fact that foreign States enjoyed immunity from execution as a matter of principle, the immunity could be set aside where the assets attached had been allocated for a commercial activity of a private law nature upon which the claim was based. See also, General National Maritime Transport Company v. Société Marseille Fret (France, Court of Cassation (First Civil Chamber). 4 February 1986, International Law Reports, vol. 77 (1988), p. 530); Re Royal Bank of Canada and Corriveau et al. (Canada, Ontario High Court. 22 October 1980, International Law Reports, vol. 64 (1983), p. 69); Banque du Gothard v. Chambre des Recours en Matière Pénale du Tribunal d'Appel du Canton du Tessin and Another (Switzerland, Federal Tribunal. 15 April 1987, International Law Reports, vol. 82 (1990), p. 50); Giamahiria araba libica popolare socialista c. Rossbeton Officine Meccaniche s.r.l. e Libyan Arab Airlines. Ministero degli affari esteri e Ministero di grazia e giustizia (Italy, Corte di Cassazione, 25 May 1989) (Rivista di diritto

(9) Once consent has been given under paragraph 1 (a), any withdrawal of that consent may only be made under the terms of the international agreement (subparagraph (i)) or of the arbitration agreement or the contract

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internazionale privato e processuale. 1990, vol. 26, p. 663); Cf. International Consolidated Companies Inc. c. Nigerian National Petroleum Corporation (Italy, Tribunale di Taranto, 18 December 1987, order) (Rivista di diritto internazionale, 1989, vol. 72, p. 109).

On the question of the measures of constraint involving the property of State enterprises, see for example, In the Matter of Constitutional Complaints of the National Iranian Oil Company Against Certain Orders of the District Court and the Court of Appeals of Frankfurt in Prejudgement Attachment Proceedings against the Complainant (37 WM Zeitschrift für Wirtschafts- und Bankrecht 722 (1983) (Federal Republic of Germany, Federal Constitutional Court, 12 April 1983. English translation in International Legal Materials, vol. XXII, p. 1279 (1983)), in which the Court found that there exists no general rule of international law mandating that accounts maintained in domestic banks and designated as accounts of a foreign government agency with separate juristic personality be treated as property of the foreign State. The Court indicated additionally that general international law does not require absolute immunity from execution of accounts standing in the name of the foreign State itself, but that immunity of accounts of a foreign Government held in banks located in the forum is to be accorded only if the account itself at the time of the levy is designed to be used for internationally protected governmental purposes. In Société Nationale Algérienne de Transport et de Commercialisation des Hydrocarbures (Sonatrach) v. Migeon (France, Court of Cassation, 1 October 1985. English translation in International Legal Materials, vol. XXVI, p. 998 (1987)); International Law Reports, vol. 77 (1988), p. 525), the court stated that, while the assets of a foreign State were not subject to attachment unless they had been allocated for a commercial activity under private law upon which the claim was based, the assets of a State-owned entity which was legally distinct from the foreign State concerned could be subjected to attachment by all debtors of that entity, of whatever type, provided that the assets formed part of a body of funds allocated for a principal activity governed by private law. See also, Société Air Zaire v. Gauthier and Van Impe (France, Court of Appeal of Paris (First Chamber). 31 January 1984, International Law Reports, vol. 77 (1988), p. 510).

In some legal systems, a sufficient legal relationship between the subject-matter and the State of the forum is also required for its courts to consider any order of attachment against property of a foreign State which is located in the territory of the State of the forum. See for example, Socialist Libyan Arab Popular Jamahiriya v. Libyan American Oil Company (LIAMCO) (Switzerland, Federal Supreme Court, First Public Law Department. 19 June 1980, International Law Reports, vol. 62 (1982), p 228).

(subparagraph (ii)). However, once a declaration of consent or a written communication to that effect (subparagraph (iii)) has been made before a court, it cannot be withdrawn. In general, once a proceeding before a court has begun, consent cannot be withdrawn.

(10) Under paragraph 1 (b), the property can be subject to measures of constraint if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding. This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability. Understandably, the question whether particular property has or has not been allocated for the satisfaction of a claim may in some situations be ambiguous and should be resolved by the court.

(11) The use of the word "is" in paragraph 1 (c) indicates that the property should be specifically in use or intended for use by the State for other than government non-commercial purposes at the time the proceeding for attachment or execution is instituted. To specify an earlier time could unduly fetter States' freedom to dispose of their property. It is the Commission's understanding that States would not encourage and permit abuses of this provision, for example by changing the status of their property in order to avoid attachment or execution. The words "for commercial [non-governmental] purposes" included in the text adopted on first reading have been replaced by the phrase "for other than government non-commercial purposes" in line with the usage of that phrase in article 16.

Paragraph 2

(12) Paragraph 2 makes more explicit the requirement of separate consent for the taking of measures of constraint under part IV. Consent under article 7 of part II does not cover any measures of constraint but is confined exclusively to immunity from the jurisdiction of a court of a State in a proceeding against another State. 190/

190/ For a more detailed account of the judicial and treaty practice of States and government contracts, see the former Special Rapporteur's seventh report (see note 187 above), paras. 85-102. In some jurisdictions, for example in Switzerland, execution is based on the existence of a sufficient connection with Swiss territory (Binnenbeziehung). See, for example, Greek Republic v. Walder and others (1930) (Recueil officiel des arrêts du Tribunal

Article 19

Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (c) of article 18:

(a) property, including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to paragraph 1 (a) and (b) of article 18.

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fédéral suisse, 1930, vol. 56, p. 237; Annual Digest ... 1929-1930 (London), vol. 5 (1935), p. 121, case No. 78); J.-F. Lalive, "Swiss law and practice in relation to measures of execution against the property of a foreign State", Netherlands Yearbook of International Law, 1979 (Alphen aan den Rijn), vol. X, p. 160; and I. Sinclair, "The law of sovereign immunity: Recent developments", Collected Courses of The Hague Academy of International Law, 1980-II (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, p. 236. See also Lord Denning's observations in Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies (1975) (The All England Law Reports, 1975, vol. 3, pp. 963 et seq.). On the requirement of a separate or second consent to execution, see the judgement of the Court of Appeal of Aix-en-Provence in Banque d'Etat tchécoslovaque v. Englander (1966) (Annuaire français de droit international, 1967 (Paris), vol. 13, p. 825; International Law Reports, vol. 47 (1974), p. 157) - however, this judgement was set aside by the Court of Cassation (1969) (Journal du droit international (Clunet) (Paris), vol. 96 (1969), p. 923; International Law Reports (Cambridge), vol. 52 (1979), p. 335); and Clerget v. Représentation commerciale de la République démocratique du Viet Nam (1969) (Annuaire français de droit international, 1970, vol. 16, p. 931).

Commentary

Paragraph 1

(1) Article 19 is designed to provide some protection for certain specific categories of property by excluding them from any presumption or implication of consent to measures of constraint. Paragraph 1 seeks to prevent any interpretation to the effect that property classified as belonging to any one of the categories specified is in fact property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (c) of article 18. The words "in particular" suggest that the enumeration in subparagraphs (a) to (e) is merely illustrative.

(2) This protection is deemed necessary and timely in view of the trend in certain jurisdictions to attach or freeze assets of foreign States, especially bank accounts, 191/ assets of the central bank 192/ or other

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191/ See, for example, *Birch Shipping Corp. v. Embassy of Tanzania* (1980) (United States of America, *Federal Supplement*, vol. 507 (1981), p. 311, at p. 313); the decision of 13 December 1977 of the Federal Constitutional Court of the Federal Republic of Germany in *X v. Republic of the Philippines* (United Nations, *Materials on Jurisdictional Immunities ...*, p. 297); and *Alcom Ltd. v. Republic of Colombia* (1984) (*The All England Law Reports, 1984*, vol. 2, p. 6). See, also, *Banco de la Nacion Lima v. Banco Cattolica del Veneto* (Switzerland, Federal Tribunal. 21 March 1984, *International Law Reports*, vol. 82 (1990), p 10).

192/ See, for example, *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria* (1979) (*Lloyd's Law Reports, 1979*, vol. 2, p. 277; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, p. 449); *Re Royal Bank of Canada and Corriveau et al*. (1980) (*Dominion Law Reports, 3d Series*, vol. 117 (1981), p. 199); *Libra Bank Ltd. v. Banco Nacional de Costa Rica* (1982) (United States of America, *Federal Reporter, 2d Series*, vol. 676 (1982), p. 47); and *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (1977) (*The All England Law Reports, 1977*, vol. 1, p. 881). See also, *Libyan Arab Socialist People's Jamahiriya v. Actimon SA* (Switzerland, Federal Tribunal, 24 April 1985, *International Law Reports* vol. 82 (1990), p. 30). Cf. *Banque Compafina v. Banco de Guatemala, et al*. (U.S. District Court for the Southern District of New York. 23 March 1984, *International Legal Materials*, vol. XIII, p. 782 (1984)).

instrumenta legati 193/ and specific categories of property which equally deserve protection. Each of these specific categories of property by its very nature, must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations.

(3) Property listed in paragraph 1 (a) is intended to be limited to that which is in use or intended for use for the "purposes" of the State's diplomatic functions. 194/ This obviously excludes property, for example bank accounts, maintained by embassies for commercial purposes. 195/ Difficulties sometimes arise concerning a "mixed account" which is maintained in the name of a diplomatic mission, but occasionally used for payment, for instance, of supply of goods or services to defray the running costs of the mission. The recent case law seems to suggest the trend that the balance of such a bank account to the credit of the foreign State should not be subject to an attachment order issued by the court of the forum State because of the

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193/ See, for example, the *Romanian legation* case (1949) (*Revue hellénique de droit international* (Athens), vol. 3 (1950), p. 331); and, in a case concerning a contract of employment at the Indian Embassy in Berne, J. Monnier, "*Note à l'arrêt de la première Cour civile du Tribunal fédéral du 22 mai 1984 dans l'affaire S. contre Etat indien*", *Annuaire suisse de droit international* (Zurich), vol. 41 (1985), p. 235.

194/ See, for example, *Alcom Ltd. v. Republic of Colombia* (1984) (see note 191 above). See also, *Republic of "A" Embassy Bank Account Case* (Austria, Supreme Court. 3 April 1986, *International Law Reports*, vol. 77 (1988), p. 489); *M.K. v. State Secretary for Justice, Council of State, President of the Judicial Division* (The Netherlands, 24 November 1986, KG (1987) No. 38, AROB tB/S (1986) No. 189). Cf. *Benamar v. Embassy of the Democratic and Popular Republic of Algeria* (Italy Corte di cassazione, plenary session, 4 May 1989, 72 *Rivista di Diritto Internazionale 416* (1989). *The American Journal of International Law*, vol. 84, p. 573 (1990).

195/ See, for example, *Griessen* (Switzerland, Federal Tribunal. 23 December 1982, *International Law Reports*, vol. 82 (1990), p. 5).

non-commercial character of the account in general. 196/ Property listed in paragraph 1 (a) also excludes property which may have been, but is no longer, in use or intended for use for diplomatic or cognate purposes. The expressions "missions" and "delegations" also include permanent observer missions and observer delegations within the meaning of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. 197/

(4) The word "military", in the context of paragraph 1 (b), includes the navy, air force and army. 198/

(5) With regard to paragraph 1 (c), the Special Rapporteur suggested the addition of the words "and used for monetary purpose" at the end of the paragraph, 199/ but they were not included for lack of general support. 200/

(6) The purpose of paragraph 1 (d) is to protect only property characterized as forming part of the cultural heritage or archives of the State which is owned by the State. 201/ Such property benefits from protection under the

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196/ See, for example, Benamar v. Embassy of the Democratic and Popular Republic of Algeria (see note 194 above); Birch Shipping Corporation v. Embassy of the United Republic of Tanzania (see note 189 above). See, however, Republic of "A" Embassy Bank Account Case (see note 194 above).

197/ The Work of the International Law Commission (Sales No. E.88, V.1), fourth edition, Annex p. 292.

198/ See for example, Wijsmuller Salvage BV v. ADM Naval Services, (the Netherlands, District Court of Amsterdam, 19 November 1987, KG (1987), No. 527, S&S (1988) No. 69).

199/ Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), para. 219.

200/ Ibid., para. 227.

201/ See, for example, Italian State v. X and Court of Appeal of the Canton of the City of Basle (Switzerland, Federal Tribunal. 6 February 1985, International Law Reports, vol. 82 (1990), p. 30).

present articles when it is not placed or intended to be placed on sale.

(7) Paragraph 1 (e) extends such protection to property forming part of an exhibition of objects of cultural or scientific or historical interest belonging to the State. [202] State-owned exhibits for industrial or commercial purposes are not covered by this subparagraph.

Paragraph 2

(8) Notwithstanding the provision of paragraph 1, the State may waive immunity in respect of any property belonging to one of the specific categories listed, or any part of such a category by either allocating or earmarking the property within the meaning of article 18 (b) paragraph 1 or by specifically consenting to the taking of measures of constraint in respect of that category of its property, or that part thereof, under article 18 (a) paragraph 1. A general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any of the specific categories, would not be sufficient to allow measures of constraint against property in the categories listed in paragraph 1.

PART V

MISCELLANEOUS PROVISIONS

Article 20

Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) in the absence of such a convention;

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

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[202] See for example, the note (26 October 1984) of the *Département fédéral des affaires étrangères, Direction du droit international public*, of Switzerland (*Annuaire suisse du droit international*, 1985, vol. 41, p. 178).

2. Service of process referred to in paragraph 1 (b) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Commentary

(1) Article 20 relates to a large extent to the domestic rules of civil procedure of States. It takes into account the difficulties involved if States are called upon to modify their domestic rules of civil procedure. At the same time, it does not provide too liberal or generous a regime of service of process, which could result in an excessive number of judgements in default of appearance by the defendant State. The article therefore proposes a middle ground so as to protect the interests of the defendant State and those of the individual plaintiff.

Paragraph 1

(2) Paragraph 1 is designed to indicate the normal ways in which service of process can be effected when a proceeding is instituted against a State. Three categories of means by which service of process is effected are provided: first, if an applicable international convention binding upon the State of the forum and the State concerned exists, service of process shall be effected in accordance with the procedures provided for in the convention. Then, in the absence of such a convention, service of process shall be effected either (i) by transmission through diplomatic channels or (ii) by any other means accepted by the State concerned. Thus, among the three categories of the means of service of process provided under paragraph 1, an international convention binding both States is given priority over the other two categories. The variety of means available ensures the widest possible flexibility, while protecting the interests of the parties concerned. 203/

203/ Cf. European Convention on State Immunity, article 16, paras. 1-3.

For the relevant provisions in national legislation, see for example, United States Foreign Sovereign Immunities Act (section 1608 (a) - (d));

Paragraphs 2 and 3

(3) Since the time of service of process is decisive for practical purposes, it is further provided in paragraph 2 that, in the case of transmission through diplomatic channels or by registered mail, service of process is deemed to have been effected on the day of receipt of the documents by the Ministry of Foreign Affairs. Paragraph 3 further requires that the documents be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned. The Special Rapporteur made a proposal in this connection to add at the end of paragraph 3 the phrase" or at least by a translation into one of the official languages of the United Nations" so that when translation into a language not widely used gave rise to difficulties on the part of the authority serving the process, translation into one of the official languages of the United Nations might be acceptable. The proposal was however not adopted.

Paragraph 4

(4) Paragraph 4 provides that a State which has entered an appearance on the merits, that is to say without contesting any question of jurisdiction or

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United Kingdom State Immunity Act (section 12 (1), (2), (3), (6) and (7)); Singapore State Immunity Act (section 14 (1), (2), (3), (6) and (7)); Pakistan State Immunity Ordinance (section 13 (1), (2), (3) and (6)); South Africa Foreign States Immunities Act (section 13 (1), (2), (3), (6) and (7)); Canada Act to provide for State immunity in Canadian courts (section 9); Australia Foreign States Immunities Act (sections 23 to 26).

With regard to recent judicial practice, see for example, Garden Contamination Case (1) (Federal Republic of Germany, Provincial Court (Landgericht) of Bonn. 11 February 1987, International Law Reports, vol. 80 (1989), p. 367); New England Merchants National Bank and Others v. Iran Power Generation and Transmission Company and Others (495 F. Supp. p. 73. U.S. District Court, Southern District, New York. 4 June 1980, International Law Reports, vol. 63 (1982), p. 408); International Schools Service v. Government of Iran (U.S. District Court, New Jersey. 19 January 1981, International Law Reports, vol. 63 (1982), p. 550); Velidor v. L/P/G Benghazi (653 F.2d p. 812. U.S. Court of Appeals, Third Circuit. 30 June 1981. Reprinted in International Legal Materials, vol. XXI, p. 621 (1982)).

procedure, cannot subsequently be heard to raise any objection based onnon-compliance with the service of process provisions of paragraphs 1 and 3. The reason for the rule is self-evident. By entering an appearance on the merits, the defendant State effectively concedes that it has had timely notice of the proceeding instituted against it. The defendant State is, of course, entitled at the outset to enter a conditional appearance or to raise a plea as to jurisdiction.

Article 21

Default judgement

1. A default judgement shall not be rendered against a State unless the court has found that:

(a) the requirements laid down in paragraphs 1 and 3 of article 20 have been complied with;

(b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 20; and

(c) the present articles do not preclude it from exercising jurisdiction.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 20 and in accordance with the provisions of that paragraph.

3. The time-limit for applying to have a default judgement set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned.

Commentary

(1) There appears to be an established practice requiring proof of compliance with the procedure for service of process and of the expiry of the time-limit before any judgement may be rendered against a foreign State in default of appearance. There is also a further requirement that such a judgement, when

rendered in default of appearance, should be communicated to the State concerned through the same procedure or channel as the service of process. 204/

Paragraph 1

(2) Default judgement cannot be entered by the mere absence of a State before a court of another State. The court must establish that certain conditions have been met before rendering its judgement. These conditions are set out in paragraph 1. A proper service of process is a precondition for making application for a default judgement to be given against a State. Under paragraph 1 (a), even if the defendant State does not appear before a court, the judge still has to be satisfied that the service of process was properly effected in accordance with paragraphs 1 and 3 of article 20. Paragraph 1 (b) gives added protection to States by requiring the expiry of not less than four months from the date of service of process. The expiry period which was three months in the text adopted on first reading has been changed to four months on second reading. The judge, of course, always has the discretion to extend the minimum period of four months if the domestic law so permits. Paragraph 1 (c) further requires a court to determine on its own initiative that the State concerned was not immune from the jurisdiction of the court. This provision, which has been introduced on second reading in response to a suggestion made in the Sixth Committee and supported by several delegations, provides an important safeguard in line with the provision of

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204/ Cf. European Convention on State Immunity article 16, para. 7.

Comparable provisions are found, for example in:

United States Foreign Sovereign Immunities Act (section 1608 (e)); United Kingdom State Immunity Act (section 12 (4) and (5)); Singapore State Immunity Act (section 14 (4) and (5)); Pakistan State Immunity Ordinance (section 13 (4) and (5)); South Africa Foreign States Immunities Act (section 13 (4) and (5)); South Africa Foreign States Immunities Amendment Act of 1988 (section 13 (5)); Canada Act to provide for State immunity in Canadian courts (section 10); Australia Foreign States Immunities Act (sections 27 and 28).

For the recent judicial practice, see for example, Azeta BV v. Republic of Chile (Netherlands, District Court of Rotterdam, 5 December 1984, Institute's Collection No. 2334); Murphy v. Republic of Panama d/b/a Air Panama International (751 F. Suppl., p. 1540, U.S. District Court, S.D. Florida. 12 December 1990).

paragraph 1 of article 6. The new paragraph 1 (c), however, has no bearing on the question of the competence of the court, which is a matter for each legal system to determine.

Paragraph 2

(3) Paragraph 2 is designed to ensure that a copy of any default judgement is transmitted to a State in conformity with the procedure and means established under paragraph 1 of article 20.

Paragraph 3

(4) Paragraph 3 is designed to ensure effective communication with the State concerned and to allow adequate opportunities to the defendant State to apply to have a default judgement set aside, whether by way of appeal or otherwise. If any time-limit is to be set for applying to have a default judgement set aside, another period of not less than four months must have elapsed before any measure can be taken in pursuance of the judgement. The period was three months in the text adopted on first reading but has been changed to four months on second reading.

Article 22

Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Commentary

Paragraph 1

(1) Article 22, which is a merger of former articles 26 and 27 provisionally adopted on first reading, provides for immunity of a State from measures of coercion and procedural immunities in a court of another State.

(2) States, for reasons of security or their own domestic law, may sometimes be prevented from submitting certain documents or disclosing certain

information to a court of another State. States should therefore not be subject to penalties for protecting their national security or for complying with their domestic law. At the same time, the legitimate interests of the private litigant should not be overlooked. [205]

(3) Paragraph 1 speaks of "no consequences" being entailed by the conduct in question, although it specifies that the consequences which might ordinarily result from such conduct in relation to the merits of the case would still obtain. This reserves the applicability of any relevant rules of the internal law of the State of the forum, without requiring another State to give evidence or produce a document.

(4) Courts are bound by their own domestic rules of procedure. In the domestic rules of procedure of many States, the refusal, for any reason, by a litigant to submit evidence would allow or even require the judge to draw certain inferences which might affect the merits of the case. Such inferences by a judge under the domestic rules of procedure of the State of the forum, when permitted, are not considered a penalty. The final sentence specifies that no fine or pecuniary penalty shall be imposed.

Paragraph 2

(5) The procedural immunities provided for in paragraph 2 apply to both plaintiff States and defendant States. Some reservations were made regarding the application of those procedural immunities in the event of the State being plaintiff in a proceeding before a court of another State since, in some systems, security for costs is required only of plaintiffs and not defendants.

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[205] Cf. European Convention on State Immunity articles 17 and 18.

For the relevant provisions in national legislation, see for example:

Australia Foreign States Immunities Act (section 29); Pakistan State Immunity Ordinance (section 14, 14 (2) (a), (3) and (4)); Singapore State Immunity Act (section 15 (1), (2), (3) and (5)); South Africa Foreign States Immunities Act (section 14 (1) (a) and (2)); United Kingdom State Immunity Act, section 13 (1), (2a), (3) and (5).

CHAPTER III

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction 206/

29. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970.

30. The work begun by the three previous Special Rapporteurs was continued by Mr. Stephen C. McCaffrey, who was appointed by the Commission as Special Rapporteur on the topic at its thirty-seventh session in 1985.

31. At that session, the Special Rapporteur submitted a preliminary report 207/ which reviewed the Commission's work on the topic to date and indicated his preliminary views as to the general lines along which the Commission's work on the topic could proceed. There was general agreement with the Special Rapporteur's proposal that he follow generally the outline proposed by the previous Special Rapporteurs in elaborating further draft articles on the topic.

206/ For a fuller statement of the historical background as well as a more detailed account of the Commission's work on the topic, see *Yearbook ... 1985*, vol. II (Part Two), pp. 68-71, document A/40/10, paras. 268-278 and Report of the International Law Commission on the work of its forty-first session, (*Offical Records of the General Assembly, Forty-fourth session, Supplement No. 10* (A/44/10)), paras. 621-636.

207/ The Commission received the Special Rapporteur's first report (*Yearbook ... 1985*, vol. II (Part One), p. 87, document A/CN.4/393) at its thirty-second session; second report (A/CN.4/399 and Add.1 and 2) at its thirty-eighth session; third report (A/CN.4/406 and Corr.1, A/CN.4/406/Add.1 and Corr.1 and A/CN.4/406/Add.2 and Corr.1) at its thirty-ninth session; fourth report (A/CN.4/412, A/CN.4/412/Add.1 and Corr.1 and A/CN.4/412/Add.2 and Corr.1-3) at its fortieth session; fifth report (A/CN.4/421 and Corr.1-4 and A/CN.4/421 and Add.1 and 2) at its forty-first session; and sixth report (A/CN.4/427 and Corr.1 and A/CN.4/427/Add.1) at its forty-second session.

32. Between the thirty-seventh (1985) and forty-second (1990) session, the Special Rapporteur submitted to the Commission six reports on the topic.

33. At its thirty-ninth session in 1987, the Commission approved the recommendation of the Drafting Committee with regard to article 1 and the question of the term "system" 208/ and provisionally adopted six articles. 209/ At its fortieth session in 1988, the Commission provisionally adopted fourteen articles. 210/

34. At the forty-second session in 1990, the Commission provisionally adopted six articles 211/ and it also referred articles proposed by the Special Rapporteur in his fifth and the first part of the sixth reports to the Drafting Committee. 212/

B. Consideration of the topic at the present session

35. At the present session, the Commission had before it the second part of the sixth report (A/CN.4/427/Add.1) and the seventh report (A/CN.4/436 and Corr.1 to 3). The second part of the sixth report contained a chapter on

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208/ Specifically, the Commission agreed to set aside for the time being the question of article 1 "Use of terms" and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis (adopted by the Commission at its thirty-second session). See *Yearbook ... 1987*, vol. II (Part Two), p. 25, note 83.

209/ Those articles are articles 2 to 7. At the conclusion of the first reading, article 3 became paragraph (c) of article 2 and the articles were renumbered. See Section D (1) and the corresponding notes below. For the commentaries to these articles, see ibid. pp. 25-38.

210/ Those articles are articles 8 to 21. At the conclusion of the first reading, some of these articles were renumbered. See Section D (1) and the corresponding notes below. For the commentaries to these articles, see *Yearbook ... 1988*, vol. II (Part Two), pp. 35-54.

211/ Those articles are articles 22 to 27. At the conclusion of the first reading, these articles were renumbered. See Section D (1) and the corresponding notes below. For the commentaries to these articles, see Report of the International Law Commission on the work of its forty-second session, (*Official Records of the General Assembly, Forty-fifth session, Supplement No. 10*) (A/45/10), pp. 147-178.

212/ Those articles were provisionally numbered 24 to 28 and article 3, para. 1 and article 4 in the reports of the Special Rapporteur. See ibid., paras. 259 to 304.

settlement of disputes, which had been introduced at the last session but was not discussed for lack of time. In order to enable the Commission to make the best use of its time, the Special Rapporteur proposed not to take up that chapter. He recommended that the debate focus on his seventh report and, in particular, on the question of the use of terms.

36. The seventh report submitted by the Special Rapporteur contained chapters on the structure of Part I of the draft articles and on the use of terms. It also contained a proposal for article [1] [2] on the use of terms, which comprised two alternatives, namely A and B.

37. The Commission considered the seventh report at its 2213th to 2218th meetings. At its 2218th meeting, the Commission referred article [1] [2] to the Drafting Committee.

38. The seventh report of the Special Rapporteur dealt primarily with the question of the definition of the term "international watercourse" and the concept of a watercourse as a "system" of waters. The Special Rapporteur considered that it was important that the draft articles under preparation be based on hydrologic reality, namely that a watercourse is a system of interrelated hydrologic components. An international watercourse could then be defined as a watercourse, parts of which are situated in two or more States. He proposed two alternative versions, A and B, for article [1] [2] on the use of terms. 213/ While the definitions employed were the same in both versions, the terms defined were slightly different; alternative A included the expression "system" and alternative B confined itself to the expression "watercourse".

213/ The two versions for article [1] [2] on the use of terms as proposed by the Special Rapporteur read as follows:

"Article [1] [2]

Use of terms

"Alternative A:

For the purposes of the present articles:

(a) A watercourse system is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

39. The report also drew attention to the question of groundwater which, it was said, formed one of the most important components of a watercourse system. In terms of quantity, it was noted, groundwater constituted 97 per cent of fresh water on Earth, excluding polar icecaps and glaciers, as contrasted with that contained in lakes and rivers, which together amounted to less than 2 per cent. In the view of the Special Rapporteur, the sheer quantity of groundwater therefore justified its inclusion in the scope of the draft articles.

40. The Special Rapporteur had also raised in his report the question of the notion that a watercourse could have a relative international character. 213 bis/ He considered that the notion of relativity was incompatible with the unitary nature of a watercourse system and pointed out that, in any event, the requirement of an actual or potential effect on other

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(b) An international watercourse system is a watercourse system, parts of which are situated in different States.

(c) A [watercourse] [system] State is a State in whose territory parts of an international watercourse system is situated.

"Alternative B:

For the purposes of the present articles:

(a) A watercourse is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(b) An international watercourse is a watercourse, parts of which are situated in different States.

(c) A [watercourse] [system] State is a State in whose territory part of an international watercourse is situated."

213 bis/ It may be recalled that the notion of the "relative international character of a watercourse" originated in a provisional working hypothesis accepted by the Commission in 1980 as the basis for its work. The provisional working hypothesis read as follows:

"A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of watercourse States had been built into the draft articles themselves. He therefore suggested that it was no longer necessary to include the notion of relative internationality in the definition of the term "watercourse".

41. The report of the Special Rapporteur invited comments on the following substantive points, in particular:

- whether for purposes of the draft articles, the term "watercourse" should be defined as a "system" of waters;
- whether groundwater should be included within the definition of "watercourse" and, if so, whether the draft articles should apply both to groundwater related to surface water ("free" groundwater) and to groundwater unrelated to surface water ("confined" groundwater), or whether they should apply only to "free" groundwater;
- whether for the purpose of the draft articles, a watercourse should be regarded as having a "relative international character".

42. The Special Rapporteur also raised the question of the structure of Part I of the draft articles. He recommended reversing the order of articles 1 and 2 so that the draft would begin with an article on "scope" followed by that on the "use of terms". He also proposed to transfer article 3 on the definition of a watercourse State (or system State), as adopted by the Commission previously, to the article on the use of terms since the definition was closely related to that of an "international watercourse" or "international watercourse system".

43. As regards the last two points, those members who addressed the issue unanimously endorsed the proposal to reverse the order of articles 1 and 2, so that the draft would begin with an article on scope, which would be followed

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their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An 'international watercourse system' is a watercourse system, components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse."

by an article on the use of terms. There was also unanimous agreement to move the definition of "watercourse State" from article 3 to the article on the use of terms.

44. Concerning the question of whether the term "watercourse" should be defined as a "system" of waters, most of the members who addressed the issue favoured the use of that concept in the definition. In their view, the essence of the definition of a watercourse system was the interdependence of its different parts which made the system a unitary whole. Moreover, it was said, only an overall approach to an international watercourse as a system in constant motion could allow for the full implementation of the principle of equitable and reasonable utilization of a watercourse.

45. A number of members who expressed support for the system concept nevertheless considered that the definition should include the idea contained in the Helsinki Rules whereby the waters of a system must flow into a common terminus. In their view, such inclusion would make the draft article more precise and would keep the scope of the articles within reasonable bounds.

46. Certain members who addressed the question, however, expressed reservations regarding the use of the system concept in the definition of a watercourse. Such a definition, it was said, might embrace all the waters in a given territory. That would mean that much of the waters in that territory would thereby fall under international regulation. If that approach were followed, it was said, it would infringe on State sovereignty and would interfere with each country's right to use its own resources in accordance with its national priorities and interests.

47. One member stated in this connection that since a watercourse was composed of different parts, it would be up to the States concerned to determine through specific watercourse agreements which of those parts should be placed under regulation by the watercourse States.

48. On the question of whether to include groundwater in the definition of a watercourse, a majority of members who spoke on the issue favoured its inclusion in the definition. It was considered that the sheer quantity of groundwater, its interrelationship to the waters of rivers and lakes and the fact that groundwater is always in motion, much like surface water, were ample reasons for its inclusion in the definition of a watercourse. Moreover, it was added, any action related to groundwater, particularly "free" groundwater, might affect the uses of an international watercourse. It was however

considered by most members who addressed the issue that only "free" groundwater associated with surface water should be included in the definition. Those members believed that "confined" groundwater should not be included because, in their view, it lacked a physical relationship with surface water and did not thus form part of the "unitary whole". A view was however expressed by one member that groundwater travelling between two or more States should also be included since the same rules were applicable.

49. Some members however expressed reservations regarding the inclusion of groundwater in the scope of the draft articles. In their view, inclusion of groundwater in the scope of the draft articles might have the effect of making almost all of the waters in the territory of some States subject to international regulation. In their view, that was not the intention of the draft articles under preparation.

50. Certain other members expressed the view that although all the components of an international watercourse could be regarded as a unitary whole for purposes of the draft articles, nevertheless special rules should be drafted to cover groundwater, even though it is part of a hydrologic cycle. In their view, the draft articles dealt primarily with surface water and did not contain provisions that focused on specific characteristics of groundwater. It was therefore suggested that groundwater, and in particular confined groundwater, should be dealt with as a separate regime.

51. The point was also made that inclusion of groundwater in the definition of "watercourse" would make it difficult to "establish by single observation in the vast majority of cases" whether parts of a watercourse are situated in different States. 214/

52. Regarding the question of whether for the purposes of the draft articles a watercourse should be regarded as having a "relative international character", many of the members who addressed the question expressed agreement with the Special Rapporteur that the notion of the "relative international character" of a watercourse, contained in the provisional working hypothesis, adopted in 1980 by the Commission, was unnecessary and would only complicate the functioning of the articles. Moreover, it was said that the concept of

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214/ See commentary to article 3, Yearbook ... 1987, vol. II (Part Two) p. 26. At the conclusion of the first reading article 3 became para. (c) of article 2.

the relative international character of a watercourse would give rise to uncertainty. If the concept of the "watercourse system" was adopted, it was clear that the use of all components constituting that "system" must be regulated in such a way that it would not adversely affect other watercourse States or the watercourse itself. Moreover, the concept was thought to be no longer necessary as sufficient safeguards had been incorporated in the draft articles themselves, thus making the idea of the relative internationality of a watercourse superfluous.

53. According to several members, however, in line with the provisional working hypothesis adopted by the Commission in 1980, a system was international only to the extent that the uses of the waters of that system had an effect on one another. In their view, therefore, there was not an absolute, but a relative international character of the watercourse. The purpose of the paragraph on the relative international character of a watercourse, it was stated, was to serve as a guarantee for riparian States against excessive or improper broadening of the scope of application of the draft articles.

54. The Special Rapporteur, in response to the discussion on issues that had been raised in connection with the seventh report, stated with respect to whether or not to use the "system" concept in the draft articles that the discussion in the Commission had indicated a clear preference for the use of that concept.

55. Regarding the question of including groundwater, the Special Rapporteur concluded that the debate had clearly indicated that groundwater should be included in the scope of the articles, at least in so far as it was related to surface water. Such an approach was supported because of the heavy reliance on groundwater as drinking water, which would increase dramatically in the near future, as populations continued to grow. Moreover, he said, pollution of surface waters could contaminate aquifers and vice versa, making those resources unusable for human needs. The debate had shown that at least certain kinds of groundwater should be included within the concept of a watercourse system.

56. On the question of the relative international character of a watercourse the Special Rapporteur observed that if the notion of relativity were to be included in the draft articles, it would seriously interfere with their

functioning. For example, he said, a State would not know whether it was a "watercourse State" unless and until it could be established that parts of the waters in its territory were affected by or affected uses of waters in another State. Watercourse States would, in his view, find it difficult to implement the various obligations as well as to enjoy certain rights contained in the draft articles. In his view, the debate had indicated clearly that the notion of the relative international character of a watercourse should not be included in the definition of the expression "international watercourse" or "international watercourse system".

57. At its 2228th to 2231st meetings, the Commission, having considered the report of the Drafting Committee, provisionally adopted on first reading the following: draft article 2 (Use of terms); draft article 10 (Relationship between uses); draft article 26 (Management); draft article 27 (Regulation); draft article 28 (Installations); draft article 29 (International watercourses and installations in time of armed conflict); and draft article 32 (non-discrimination). 215/ The Commission also adopted draft article 30 (Indirect procedures) and draft article 31 (Data and information vital to national defence or security) which were amended and renumbered versions of two previously adopted articles, namely draft articles 20 and 21. At the 2231st meeting, the Commission adopted on first reading the draft articles as a whole. The draft articles are reproduced in Section D (1) below.

58. At its 2237th meeting, the International Law Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles set out in Section D (1) of the present chapter, through the Secretary-General, to Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1993.

C. Tribute to the Special Rapporteur, Mr. Stephen C. McCaffrey

59. At its 2231st meeting, on 27 June 1991, the Commission, after adopting the text of the articles on the law of the non-navigational uses of international watercourses, adopted the following resolution by acclamation:

215/ The text of the articles and the commentaries thereto appear in Section D (2) below.

"The International Law Commission,

"Having adopted provisionally the draft articles on the law of the non-navigational uses of international watercourses,

Wishes to express to the Special Rapporteur, Mr. Stephen C. McCaffrey, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles relating to the law of the non-navigational uses of international watercourses."

D. Draft articles on the law of the non-navigational uses of international watercourses

1. Text of draft articles provisionally adopted by the Commission on first reading

Part I

INTRODUCTION

Article 1 216/

Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 2 217/

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

216/ Initially adopted as article 2. For the commentary, see *Yearbook ... 1987*, vol. II (Part Two), p. 25.

217/ Subpara. (c) was initially adopted as article 3. For the commentary, see ibid., p. 26. For the commentary to subparas. (a) and (b) see Section D (2) below.

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3 218/

Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4 219/

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercoure State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

218/ Initially adopted as article 4. For the commentary, see *Yearbook ... 1987*, vol. II (Part Two), p. 27.

219/ Initially adopted as article 5. For the commentary, see ibid., p. 30.

Part II

GENERAL PRINCIPLES

Article 5 220/

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6 221/

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(d) existing and potential uses of the watercourse;

(e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

220/ Initially adopted as article 6. For the commentary, see ibid., p. 31.

221/ Initially adopted as article 7. For the commentary, see ibid., p. 36.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Article 7 222/

Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

Article 8 223/

General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutal benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9 224/

Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

222/ Initially adopted as article 8. For the commentary, see *Yearbook ... 1988*, vol. II (Part Two), p. 35.

223/ Initially adopted as article 9. For the commentary, see ibid., p. 41.

224/ Initially adopted as article 10. For the commentary, see ibid., p. 43.

Article 10 225/

Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

PART III

PLANNED MEASURES

Article 11 226/

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

Article 12 227/

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13 228/

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

225/ For the commentary see Section D (2) below.

226/ For the commentary, see Yearbook ... 1988, vol. II (Part Two), p. 45.

227/ For the commentary, see ibid., p. 46.

228/ For the commentary, see ibid., p. 49.

Article 14 229/

Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

Article 15 230/

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period referred to in article 13, together with a documented explanation setting forth the reasons for the finding.

Article 16 231/

Absence of reply to notification

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

Article 17 232/

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

229/ For the commentary, see ibid., p. 50.

230/ For the commentary, see ibid.

231/ For the commentary, see ibid., p. 51.

232/ For the commentary, see ibid.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18 233/

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

Article 19 234/

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

233/ For the commentary, see ibid., p. 52.

234/ For the commentary, see ibid., p. 53.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

PART IV

PROTECTION AND PRESERVATION

Article 20 235/

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

Article 21 236/

Prevention, reduction and control of pollution

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

235/ Initially adopted as article 22. For the commentary see Report of the International Law Commission on the work of its forty-second session, (*Official Records of the General Assembly, Forty-fifth session, Supplement No. 10*) (A/45/10), p. 147.

236/ Initially adopted as article 23. For the commentary, see ibid., p. 158.

Article 22 237/

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in appreciable harm to other watercourse States.

Article 23 238/

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 24 239/

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 25 240/

Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural

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237/ Initially adopted as article 24. For the commentary, see ibid., p. 167.

238/ Initially adopted as article 25. For the commentary, see ibid., p. 169.

239/ Initially adopted as article 26. For the commentary, see ibid., p. 172.

240/ Initially adopted as article 27. For the commentary, see ibid., p. 174.

causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

PART VI

MISCELLANEOUS PROVISIONS

Article 26 241/

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

Article 27 242/

Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

241/ For the commentary see Section D (2) below.

242/ Ibid.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Article 28 243/

Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

Article 29 244/

International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

243/ Ibid.

244/ For the commentary, see Section D (2) below.

Article 30 245/

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any indirect procedure accepted by them.

Article 31 246/

Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 32 247/

Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

245/ This article, initially adopted as article 21, has been moved to Part VI and reformulated to make it applicable to the entire set of articles. In particular, the article has been recast to provide for indirect means of fulfilling the entire range of procedural obligations set forth in the draft. The commentary to former article 21 remains valid for article 30. That commentary may be found in Yearbook ... 1988, vol. II (Part Two), p. 54.

246/ Initially adopted as article 20. For the commentary see ibid.

247/ For the commentary, see Section D (2) below.

2. Text of draft articles 2, 10, 26 to 29 and 32 with commentaries thereto provisionally adopted by the Commission at its forty-third session

PART I

INTRODUCTION

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Article 2

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Commentary

(1) Article 2 defines certain terms that are used throughout the draft articles. Other terms that are used only in one article are defined in the article in which they are employed.

(2) Subparagraph (a) defines the term "international watercourse", which is used in the title of the topic and throughout the draft articles. The focus in this paragraph is on the adjective "international", since the term "watercourse" is defined in subparagraph (b). Subparagraph (a) provides that, in order to be regarded as an "international" watercourse, parts of the watercourse in question must be situated in different States. As stated in the commentary to the former article 3, which has become subparagraph (c) of the present article, whether parts of a watercourse are situated in different States "depends on physical factors whose existence can be established by simple observation in the vast majority of cases". 248/ The most common examples would be a river or stream that forms or crosses a boundary, or a lake through which a boundary passes. The word "situated" is not intended to

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248/ Yearbook ... 1987, vol. II (Part Two), p. 26.

imply that the water in question is static. As will appear from the definition of "watercourse" in subparagraph (b), while the channel, lake bed or aquifer containing the water is itself stationary, the water it contains is in constant motion.

(3) One member of the Commission believed that it would be more accurate to describe the watercourses covered by the present articles as "multinational" or "plurinational" on the ground that, in his view, the term "international" implies that the waters in question are subject to common management.

(4) Subparagraph (b) defines the term "watercourse". While this word is not used in the draft articles except in conjunction with another term (e.g., "international watercourse", "watercourse State", "watercourse agreements"), it is defined separately for purposes of clarity and precision. Since the expression "international watercourse" is defined in subparagraph (a) as a "watercourse" having certain geographical characteristics, a clear understanding of the meaning of the latter term is necessary.

(5) The term "watercourse" is defined as a "system of surface and underground waters". This phrase refers to the hydrologic system composed of a number of different components through which water flows, both on and under the surface of the land. These components include rivers, lakes, aquifers, glaciers, reservoirs and canals. So long as these components are interrelated with one another, they form part of the watercourse. This idea is expressed in the phrase, "constituting by virtue of their physical relationship a unitary whole". Thus, water may move from a stream into the ground under the stream bed, spreading beyond the banks of the stream, then re-emerge in the stream, flow into a lake which empties into a river, be diverted into a canal and carried to a reservoir, etc. Because the surface and underground waters form a system, and constitute by virtue of their physical relationship a unitary whole, human intervention at one point in the system may have effects elsewhere within it. It also follows from the unity of the system that the term "watercourse" does not include "confined" groundwater, i.e., that which is unrelated to any surface water. Some members of the Commission, however, believed that such groundwater should be included within the term "watercourse", provided that the aquifer in which it is contained is intersected by a boundary. It was also suggested that confined groundwater could be the subject of separate study by the Commission with a view to the preparation of draft articles.

(6) Certain members of the Commission expressed doubts about the inclusion of canals among the components of a watercourse because, in their view, the draft had been elaborated on the assumption that a "watercourse" was a natural phenomenon.

(7) Subparagraph (b) also requires that in order to constitute a "watercourse" for the purposes of the present articles, the system of surface and underground waters must flow into a "common terminus". This requirement was included in order to introduce a certain limitation upon the geographic scope of the articles. Thus, for example, the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purpose of the present articles.

(8) As already indicated, the definition of "watercourse State" which was formerly contained in article 3 has been moved, without change, to subparagraph (c) of article 2. This change was made in order to present together, in a single article on use of terms, definitions of expressions that appear throughout the present articles.

(9) The concept of a watercourse or river system is not a novel one. The expression has long been used in international agreements to refer to a river, its tributaries and related canals. The Treaty of Versailles contains a number of references to "river systems". For example, in declaring various rivers to be "international", the Treaty refers to "all navigable parts of these river systems ... together with lateral canals and channels constructed either to duplicate, or to improve naturally navigable sections of the specified rivers systems, or to connect two naturally navigable sections of the same river". 249/ While the article in question is concerned with navigational uses, there is no doubt that equitable utilization could be affected, or appreciable harm caused, through the same system of waters by virtue of their very interconnectedness. In the River Oder case, the Permanent Court of International Justice held that the international regime of the river Oder extended, under the Treaty of Versailles, to: "All navigable

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249/ Treaty of Versailles, article 331, British and Foreign State Papers, 1919, vol. CXII (London, H.M. Stationery Office, 1922), p. 173. See also, e.g. article 362, which refers to "the Rhine river system", ibid., p. 184.

parts of these river systems ... together with lateral canals or channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems ..." 250/

(10) Provisions similar to those of the Treaty of Versailles may be found in the 1921 Convention instituting the definitive status of the Danube. That agreement refers in its article 1 to the "internationalized river system", which article 2 defines to include "[a]ny lateral canals or waterways which may be constructed ..." 251/

(11) More recently, the 1950 Convention between the Union of Soviet Socialist Republics and Hungary refers in its Articles 1 and 2 to "the water systems of the Tisza river basin". 252/ A series of treaties between Yugoslavia and its neighbours, 253/ concluded in the mid-1950s, include within their scope, *inter alia*, "watercourses and water systems" and, in particular, "groundwater". 254/ Two of those treaties contain broad definition of the expression "water system", which includes "all watercourses (surface or underground, natural or artificial)". 255/

250/ Judgement of 10 September 1929, P.C.I.J., Series A, No. 23.

251/ League of Nations, *Treaty Series*, vol. XXVI, p. 177.

252/ Convention between the USSR and Hungary concerning measures to prevent floods and to regulate the water regime on the Soviet-Hungarian frontier in the area of the frontier river Tisza, 9 June 1950, United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (hereinafter cited *Legislative Texts*), Treaty No. 227, p. 827.

253/ United Nations Legislative Series, *Legislative Texts*, Treaty Nos. 228 (with Hungary); 128 (with Albania) and 161 (with Bulgaria) (United Nations publication, Sales No. 63.V.4). See also the 1964 treaty between Poland and the Soviet Union, United Nations, *Treaty Series*, vol. 552, p. 175, article 2, para. 3; the 1972 Convention between Switzerland and Italy concerning the protection of frontier waters against pollution, *Rev. Gen. de Droit Int'l Publ*. p. 265 (1975); and the Frontier Rivers Agreement of 16 September 1971 between Finland and Sweden, Chapter 3, article 1, United Nations, *Treaty Series*, vol. 825, p. 191.

254/ Ibid., Treaty nos. 228, 128 and 161.

255/ Ibid., Treaty Nos. 128 and 228, article 1, para. 3.

(12) The Indus Waters Treaty of 1960 between India and Pakistan also utilizes the system concept. In the preamble of that agreement, the parties declare that they are "desirous of attaining the most complete and satisfactory utilization of the waters of the Indus system of rivers ..." 256/ The Treaty applies to named rivers, their tributaries and any connecting lakes, 257/ and defines the term "tributary" broadly. 258/

(13) Among more modern treaties, the Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, and the annexed Action Plan, 259/ are noteworthy for their holistic approach to international water resources management. For example, the Action Plan states its objective as being to overcome certain enumerated problems "and thus to promote the development, and implementation of environmentally sound water resources management in the whole river system". 260/ A number of other treaties further demonstrate that States recognize in their practice the importance of dealing with international watercourse systems in their entirety. 261/

256/ Indus Waters Treaty of 19 September 1960 between India and Pakistan, Legislative Texts, Treaty No. 98, p. 300.

257/ Ibid., article 1, paras. (3) and (8).

258/ Ibid., article 1, para. (2).

259/ United Nations Environment Programme, Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, Final Act, Harare, 26-28 May 1987 (United Nations, 1987), reprinted in International Legal Materials, vol. XXVII (1988), p. 1109.

260/ Action Plan, ibid., para. 15.

261/ These agreements include the 1963 Act regarding Navigation and Economic Cooperation between the States of the Niger Basin, Act of 26 October 1963, Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation, Natural Resources/Water Series No. 13, (1984) United Nations publication Sales No. 84, II.A.7), p. 6. See also the Convention of 21 November 1980 creating the Niger Basin Authority, ibid., p. 56; the 1964 Convention and Statutes relating to the development of the Chad Basin, ibid., p. 32; the 1978 Convention relating to the creation of the Gambia River Basin Development Organization, ibid., p. 42; the 1969 Treaty on the River Plate Basin, United Nations, Treaty Series, vol. 875, p. 3; summarized in Yearbook ... 1974, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60; the 1961 Treaty relating to development of the water resources of the Columbia River basin, Treaty of 17 January 1961 between

International organizations and experts have reached similar conclusions. 262/

Canada and the United States, Legislative Texts, Treaty No. 65; and the 1944 Exchange of notes relating to a study of the use of the waters of the Columbia River Basin, United Nations, Treaty Series, vol. 109, p. 191. It is interesting to note that at least one of the States through whose territory the Columbia River flows has used the term "system" in referring to international watercourses. See "Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay river system under customary international law and the Treaty of 1909", Memorandum of the [United States] State Department, 85th Congress, Second Session, document No. 118 (Washington, D.C., 1958), p. 89.

262/ The work of the Economic Commission for Europe follows this general approach. See, e.g., the Declaration of Policy on the Rational Use of Water, adopted by the ECE in 1984, ECE, Two Decades of Cooperation on Water, document ECE/ENVWA/2 (1988), p. 15; and other instruments contained in that publication. A number of meetings held under United Nations auspices have adopted recommendations urging that international watercourses be dealt with as a unitary whole. See, e.g., the recommendation adopted at the Interregional Meeting on River and Lake Basin Development, held at Addis Ababa in 1988, set forth in Natural Resources/Water Series No. 20 (1990) (United Nations publication, Sales No. 90.11.A.10), p. 18. The New York Resolution, adopted in 1958 by the International Law Association, contains the "principle of international law" that "A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal)". International Law Association (ILA), Report of the Forty-Eighth Conference, New York, 1958, annex II, p. 99, Agreed Principles of International Law, Principle I. The Helsinki Rules, adopted by the ILA in 1966, employ the expression "system of waters" in defining the term "international drainage basin". Helsinki Rules on the Uses of the Waters of International Rivers, article II, comment (a), International Law Association, Report of Fifty-Second Conference, Helsinki, 1966. See also Article I of the 1961 Salzburg Resolution on the Use of International Non-Maritime Waters, adopted by the Institute of International Law ("watershed extending upon the territory of two or more States"), Annuaire de l'Institut de droit international, vol. 49, (II) (1961), p. 87, and the Athens Resolution on the Pollution of Rivers and Lakes and International Law, adopted by the Institute in 1979, ibid., Vol. 58 (1), Athens session, September 1979, (Basel/Munich 1980). A private group of legal experts, the Inter-American Bar Association, adopted a resolution in 1957 dealing with "every watercourse or system of rivers or lakes ... which may traverse or divide the territory of two or more States ... referred to hereinafter as a 'system of international waters'". Inter-American Bar Association, Proceedings of the 10th Conference held at Buenos Aires from 14-21 November 1957 (2 vols.) (Buenos Aires, 1958), reproduced in Yearbook ... 1974, vol. II (Part Two), p. 208, Document A/5409, para. 1092. The need to regulate and develop an international watercourse as a whole has also been recognized by such individual experts as H.A. Smith, in The Economic Uses of International Rivers (1931), pp. 150-151; James Brierly, in The Law of Nations (5th ed. 1955), p. 204; and Johan Lammers, in Pollution of International Watercourses (1984), pp. 19-20.

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PART II

GENERAL PRINCIPLES

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Article 10

Relationship between uses

> 1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.
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> 2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

Commentary

(1) Article 10 sets forth the general principle that no use of an international watercourse enjoys inherent priority over other uses. The article also addresses the situation in which there is a conflict between different uses of an international watercourse.

(2) Since States, through agreement or practice, often give priority to a specific use or class of uses, paragraph 1 is couched in terms of a residual rule. Thus, the opening clause of the paragraph preserves any priority established by "agreement or custom" between the watercourse States concerned. The term "agreement" is used in its broad sense and would include, e.g. an arrangement or modus vivendi that had been arrived at by watercourse States. Furthermore, it is not limited to "watercourse agreements" since it is possible that certain uses, such as navigation, could be addressed in other kinds of agreements such as treaties of amity. The word "custom" applies to situations in which there may be no "agreement" between watercourse States but where, by tradition or in practice, they have given priority to a particular use. The reference to an "inherent priority" likewise indicates that nothing in the nature of a particular type or category of uses gives it a presumptive or intrinsic priority over other uses, leaving watercourse States free to decide to accord priority to a specific use in relation to a particular international watercourse. This applies equally to navigational uses which,

according to article 1, paragraph 2, fall within the scope of the present articles "in so far as other uses affect navigation or are affected by navigation".

(3) Paragraph 2 deals with the situation in which different uses of an international watercourse conflict, or interfere, with each other but where no applicable priorities have been established by custom or agreement. In such a case, paragraph 2 indicates that the situation is to be resolved with reference to the principles and factors contained in articles 5 to 7, "with special regard being given to the requirements of vital human needs". Within the meaning of the article, therefore, a "conflict" between uses could only arise where no system of priorities governing those uses, or other means of accommodating them, had been established by agreement or custom as between the watercourse States concerned. It bears emphasis that the paragraph refers to a "conflict" between uses of an international watercourse, and not a conflict or dispute between watercourse States. 263/

(4) The principles and factors to be applied in resolving a conflict between uses of an international watercourse under paragraph 2 are those contained in articles 5, 6 and 7, namely, the obligation of equitable and reasonable utilization and participation, and the duty not to cause appreciable harm. The factors to be taken into account under article 6 are those that are relevant to the international watercourse in question. However, in deciding upon the manner in which such a conflict is to be resolved, watercourse States are to have "special regard ... to the requirements of vital human needs". That is, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation. This criterion is an accentuated form of the factor contained in article 6, paragraph 1 (b), which refers to the "social and economic needs of the watercourse States concerned". Since paragraph 2 includes a reference to article 6, the latter factor is, in any event, one of those to be taken into account by the watercourse States concerned in arriving at a resolution of a conflict between uses.

263/ See also para. (9) of the commentary to article 5 (formerly art. 6), Yearbook ... 1987, vol. II, (Part Two), p. 32.

(5) While navigational uses may have enjoyed a general priority earlier in this century, 264/ States recognized the need for greater flexibility as other kinds of uses began to rival navigation in economic and social importance. A resolution adopted in 1966 by the Fourth Annual Meeting of the Inter-American Economic and Social Council at the Ministerial Level exemplifies this shift in attitude in its recognition of the importance of taking into account the variety of potential uses of a watercourse. The resolution recommends that member countries promote, for the common good, the economic utilization of the hydrographic basins and streams of the region of which they are a part, for "transportation, the production of electric power, irrigation works, and other uses, and particularly in order to control and prevent damage such as periodically occurs as the result of ... floods". 265/ In the same year, the International Law Association also concluded that no individual use enjoys general priority. Article VI of the ILA's Helsinki Rules on the Uses of the Waters of International Rivers provides that: "A use or category of uses is not entitled to any inherent preference over any other use or category of uses." 266/ The importance of preserving sufficient flexibility to ensure a supply of fresh water adequate to meet human needs in the next century was

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264/ Illustrative of this position is article 10, para. 1, of the 1921 Barcelona Convention and Statute on the regime of navigable waterways of international concern; League of Nations, Treaty Series, vol. VII, p. 57. Other examples may be found in the "Declaration of Montevideo", approved by the Seventh International Conference of American States in 1933, article 5, reproduced in Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, annex I, A; and rule II, 4, of the 1911 "Madrid resolution" of the Institute of International Law (on which art. 5 of the Montevideo Declaration was based), Annuaire de l'Institut de droit international, 1911 (Paris), vol. 24, p. 366.

265/ Resolution 24-M/66, "Control and economic utilization of hydrographic basins and streams in Latin America" (sole operative paragraph), reproduced in Yearbook ... 1974, vol. II (Part Two), p. 351, document A/CN.4/274, para. 380.

266/ International Law Association, Report of the Fifty-second Conference, Helsinki, 1966 (London 1967), p. 491.

recently emphasized in the "Delft Declaration". Adopted at a symposium held in Delft, the Netherlands, 3-5 June 1991, under the sponsorship of the United Nations Development Programme (UNDP), the Declaration notes that by the year 2000 nearly half the world's population will be living in cities. It refers to the "daunting" challenge to satisfy the water needs of "exploding" metropolitan areas "given the equally increasing need for water for irrigated agriculture and the problems arising from urban and industrial pollution". The water experts at the symposium concluded that in order to satisfy human water needs "in a sustainable way, advanced measures have to be taken to protect and conserve the water and environmental resources". 267/ Such measures would often be impossible if a particular use enjoyed inherent priority. The absence of such a priority among uses will facilitate the implementation of measures designed to ensure that "vital human needs" are satisfied.

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PART VI

MISCELLANEOUS PROVISIONS

Article 26

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

267/ The Delft Declaration is annexed to a UNDP press release, Geneva, 10 June 1991.

Commentary

(1) Article 26 recognizes the importance of cooperation by watercourse States in managing international watercourses with a view to ensuring their protection while maximizing benefits for all watercourse States concerned. It is intended to facilitate the consideration by watercourse States of modalities of management that are appropriate to the individual States and watercourses in question.

(2) Paragraph 1 requires that watercourse States enter into consultations concerning the management of an international watercourse if any watercourse State should so request. The paragraph does not require that watercourse States "manage" the watercourse in question, or that they establish a joint organization, such as a commission, or other management mechanism. The outcome of the consultations is left in the hands of the States concerned. States have, in practice, established numerous joint river, lake and similar commissions, many of which are charged with management of the international watercourses. Management of international watercourses may also be effected through less formal means, however, such as by the holding of regular meetings between the appropriate agencies or other representatives of the States concerned. Thus paragraph 1 refers to a joint management "mechanism" rather than an organization in order to provide for such less formal means of management.

(3) Paragraph 2 indicates in general terms the most common features of a programme of management of an international watercourse. Planning the development of a watercourse so that it may be sustained for the benefit of present and future generations is emphasized in subparagraph (a) because of its fundamental importance. While joint commissions have proved an effective vehicle for carrying out such plans, the watercourse States concerned may also implement plans individually. The functions mentioned in subparagraph (b) are also common features of management regimes. Most of the specific terms contained in that subparagraph are derived from other articles of the draft, in particular article 5. The adjective "rational" indicates that the "utilization, protection and control" of an international watercourse should be planned by the watercourse States concerned, rather than being carried out on a haphazard or ad hoc basis. Together, subparagraphs (a) and (b) would include such functions as: planning of sustainable, multi-purpose and

integrated development of international watercourses; facilitation of regular communication and exchange of data and information between watercourse States; and monitoring of international watercourses on a continuous basis.

(4) A review of treaty provisions concerning institutional arrangements, in particular, reveals that States have established a wide variety of organizations for the management of international watercourses. Some agreements deal only with a particular watercourse while others cover a number of watercourses or large drainage basins. The powers vested in the respective commissions are tailored to the subject matter of the individual agreements. Thus, the competence of a joint body may be defined rather specifically where a single watercourse is involved and more generally where the agreement covers an international drainage basin or a series of boundary rivers, lakes and aquifers. Article 26 is cast in terms that are intended to be sufficiently general to be appropriate for a framework agreement. At the same time, the article is designed to provide guidance to watercourse States with regard to the powers and functions that could be entrusted to such joint mechanisms or institutions as they may decide to establish.

(5) The idea of establishing joint mechanisms for the management of international watercourses is hardly a new one. 268/ As early as 1911, the Institute of International Law recommended "that the interested States appoint permanent joint commissions" to deal with "new establishments or the making of alterations in existing establishments". 269/ Many of the early agreements

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268/ The 1754 Treaty of Vaprio between the Empress of Austria, in her capacity as Duchess of Milan and the Republic of Venice, entrusted a pre-existing joint boundary commission with functions relating to the common use of the river Ollia. Parry, The Consolidated Treaty Series, Vol. 40, pp. 215-228. Another early example is found in the 1785 Treaty of Fontainebleau between Austria and the Netherlands, which formed a bipartite body to determine the best sites for the joint construction of locks on the River Meuse. Martens, Recueil des Traites, 2nd ed., Vol. 4, p. 55, also referred to in the 1952 report of the Economic Commission for Europe (ECE), "Legal aspects of hydroelectric development of rivers and lakes of common interest", document E/ECE/136-E/ECE/EP/98/Rev.1, paras. 175, et seq.

269/ Resolution on "International regulations regarding the use of international watercourses", Annuaire de l'Institut de droit international, Madrid session, April 1911 (Paris 1911), vol. 24, pp. 365-367, reproduced in Yearbook ... 1974, Vol. II (Part Two), p. 200, document A/5409, para. 1071.

concerning international watercourses, particularly those of the nineteenth century, were especially concerned with the regulation of navigation and fishing. 270/ The more recent agreements, especially those concluded since the Second World War, have focused more upon other aspects of the utilization or development of international watercourses, such as the study of the development potential of the watercourse, irrigation, flood control, hydroelectric power generation and pollution. 271/ These kinds of uses, which took on greater importance due to the intensified demand for water, food and electricity, have necessitated to a much greater degree the establishment of joint management mechanisms. Today there are nearly as many such mechanisms as there are major international watercourses. 272/ They may be ad hoc or

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270/ An illustrative survey may be found in the fourth report of the Special Rapporteur, Yearbook ... 1988, vol. II (Part One) document A/CN.4/412, paras. 39-48.

271/ This point is illustrated by the discussion of "Multilateral agreements" in United Nations Management of international water resources: institutional and legal aspects, Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2) (1987), pp. 33-36, especially p. 34.

272/ A survey of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses, compiled by the Secretariat in 1979, lists 90 such bodies. Annotated list of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses, April 1979 (unpublished). While the largest number of the commissions listed deal with watercourses in Europe, every region of the world is represented and the number of commissions was increasing in developing countries, particularly on the African continent, at the time the list was prepared. Ibid., p. ii.

permanent, and they possess a wide variety of functions and powers. [273] Article 26 takes into account not only this practice of watercourse States, but also the recommendations of conferences and meetings held under United Nations auspices to the effect that those States should consider establishing joint management mechanisms in order to attain maximum possible benefits from and protection of international watercourses. [274]

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[273] For summary descriptions of some of these agreements, "selected to illustrate the widest possible variety of arrangements", see ibid., annex IV. See also the list of agreements setting up joint machinery for the management of international watercourses in International Law Association (ILA) Report of the Fifty-seventh Conference, Madrid, 1976 (London, 1978), pp. 256-266; and Ely and Wolman, "Administration", in The Law of International Drainage Basins (Garretson, Hayton & Olmstead, eds. and contribs. 1966), p. 124; and the sixth report of the Special Rapporteur, document A/CN.4/427, paras. 3-6. The kinds of functions and powers that have been conferred upon joint management mechanisms are illustrated in the following three agreements from three separate continents: the Convention creating the Niger Basin Authority, 21 November 1980 (Benin, Cameroon, Chad, Ivory Coast, Guinea, Mali, Niger, Nigeria, Upper Volta), articles 3-5; Treaties concerning the utilization of international watercourses for other purposes than navigation, Africa, Natural Resources/Water Series No. 13, (United Nations publication, Sales No. 84.II.47), Treaty No. 13, at p. 56; the Indus Waters Treaty, 19 September 1960 (India and Pakistan), Legislative Texts, Treaty No. 98, p. 300; and the Treaty between Canada and the United States relating to boundary waters, and questions arising between the United States and Canada, 11 January 1909, ibid., Treaty No. 79, p. 260.

[274] See, e.g., the Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14), Chapt. II, "Action Plan for the Human Environment", recommendation 51; and United Nations Economic Commission for Africa, Department of Technical Cooperation for Development, Interregional Meeting on River and Lake Development, with emphasis on the African region, Addis Ababa, Ethiopia, 10-16 October 1988, Report of the Meeting, document ECA/NRD/IMRLBD/42, 14 October 1988, pp. 35-37. The work of international organizations in this field is surveyed in the sixth report of the Special Rapporteur, A/CN.4/427, paras. 7-17.

Article 27

Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Commentary

(1) Article 27 deals with the regulation, by watercourse States, of the flow of waters of an international watercourse. Regulation of the flow of watercourses is often necessary both to prevent harmful effects of the current, such as floods and erosion, and to maximize the benefits that may be obtained from the watercourse. The article consists of three paragraphs, setting forth respectively the basic obligation in respect of regulation, the duty of equitable participation as it applies to regulation, and a definition of the term "regulation".

(2) Paragraph 1 is a specific application of the general obligation to cooperate provided for in article 9. The paragraph requires watercourse States to cooperate, where appropriate, specifically with regard to needs and opportunities for regulation. As indicated in the preceding paragraph of this commentary, such needs and opportunities would normally relate to the prevention of harm and the increasing of benefits from the international watercourse in question. The words "where appropriate" emphasize that the obligation is not to seek to identify needs and opportunities, but to respond to those that exist.

(3) Paragraph 2 applies to situations in which watercourse States have agreed to undertake works for the regulation of the flow of an international watercourse. It is a residual rule which requires watercourse States to "participate on an equitable basis" in constructing, maintaining, or defraying the costs of those works unless they have agreed on some other arrangement. This duty is a specific application of the general obligation of equitable

participation contained in article 5. It does not require watercourse States to "participate", in any way, in regulation works from which they derive no benefit. It would simply mean that when one watercourse State agrees with another to undertake regulation works, and receives benefits therefrom, the former would be obligated, in the absence of agreement to the contrary, to contribute to the construction and maintenance of the works in proportion to the benefits it received therefrom.

(4) Paragraph 3 contains a definition of the term "regulation". The definition identifies, first, the means of regulation, i.e., "hydraulic works or any other continuing measure" and, second, the objectives of regulation, i.e., "to alter, vary or otherwise control the flow of the waters". Specific means of regulation commonly include such works as dams, reservoirs, weirs, canals, embankments, dikes, and river bank fortifications. They may be used for such objectives as regulating flow of water, so as to prevent floods in one season and drought in another; guarding against serious erosion of river banks or even changes in the course of a river; and assuring a sufficient supply of water, e.g., to keep pollution within acceptable limits, or to permit such uses as navigation and timber floating. Making the flow of water more consistent through regulation or control works can also extend periods during which irrigation is possible, permit or enhance the generation of electricity, alleviate siltation, prevent the formation of stagnant pools in which the malarial mosquito may breed, and sustain fisheries. However, regulation of the flow of an international watercourse may also have adverse effects upon other watercourse States. For example, a dam may reduce seasonal flows of water to a downstream State or flood an upstream State. The fact that regulation of the flow of water may be necessary to achieve optimal utilization and, at the same time, potentially harmful, demonstrates the importance of cooperation between watercourse States in the manner provided for in article 27.

(5) The numerous treaty provisions concerning regulation of the flow of international watercourses demonstrate that States recognize the importance of

cooperation in this respect. 275/ This practice and the need for strengthening cooperation among watercourse States with regard to regulation has also led an organization of specialists in international law to elaborate a set of general rules and recommendations concerning the regulation of the flow of international watercourses. 276/ The present article, which was inspired by the practice of States in this field, contains general obligations, appropriate for a framework instrument, relating to a subject of concern to all watercourse States.

Article 28

Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

275/ A number of these provisions are referred to in the fifth report of the Special Rapporteur, document A/CN.4/421/Add.2, paras. 131-138. Representative examples include the 1959 Agreement between the Soviet Union, Norway and Finland concerning the regulation of Lake Inari by means of the Kaitakoski hydroelectric power station and dam, United Nations *Treaty Series*, vol. 346, p. 167; the 1944 Treaty between the United States and Mexico relating to the utilization of the waters of the Colorado and Tijuana rivers and the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, ibid., vol. 3, p. 313; the 1959 Agreement between the United Arab Republic and the Sudan for the full utilization of the Nile waters, ibid., vol. 453, p. 51; the 1969 Treaty of the La Plata River Basin (Argentina, Bolivia, Brazil, Paraguay and Uruguay) (art. I, para. (b)), ibid., vol. 875, p. 11; and the 1960 Indus Waters Treaty between India and Pakistan, *Legislative Texts*, Treaty No. 98, pp. 325-332 (Annexure E).

276/ At its 1980 Conference in Belgrade, the International Law Association adopted nine articles on the Regulation of the Flow of Water of International Watercourses, ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), p. 4. The articles are set forth in the fifth report of the Special Rapporteur, document A/CN.4/421/Add.2., para. 139.

Commentary

(1) Article 28 concerns the protection of installations, such as dams, barrages, dikes and weirs from damage due to deterioration, the forces of nature or human acts, which may result in appreciable harm to other watercourse States. The article consists of two paragraphs which, respectively, lay down the general obligation and provide for consultations concerning the safety of installations.

(2) Paragraph 1 requires that watercourse States employ their "best efforts" to maintain and protect the works there described. Watercourse States may fulfil this obligation by doing what is within their individual capabilities to maintain and protect installations, facilities and other works related to an international watercourse. Thus, for example, a watercourse State should exercise due diligence to maintain a dam, i.e., keep it in good order, such that it will not burst, causing appreciable harm to other watercourse States. Similarly, all reasonable precautions should be taken to protect such works from foreseeable kinds of damage due to forces of nature, such as floods, or to human acts, whether wilful or negligent. The wilful acts in question would include terrorism and sabotage, while negligent conduct would encompass any failure to exercise ordinary care under the circumstances which resulted in damage to the installation in question. The words "within their respective territories" reflect the fact that maintenance and protection of works normally carried out by the watercourse State in whose territory the works in question are located. Paragraph 1 in no way purports to authorize much less require, one watercourse State to maintain and protect works in the territory of another watercourse State. However, there may be circumstances in which it would be appropriate for a watercourse State to participate in the maintenance and protection of works outside its territory as, for example, where it operated the works jointly with the State in which they were situated.

(3) Paragraph 2 establishes a general obligation of watercourse States to enter into consultations concerning the safe operation, maintenance or protection of water works. The obligation is triggered by a request of a watercourse State "which has serious reason to believe that it may suffer appreciable adverse effects" arising from the operation, maintenance or protection of the works in question. Thus, in contrast to paragraph 1, this paragraph deals with exceptional situations in which a watercourse State perceives the possibility of a particular danger. The cases addressed in

paragraph 2 should also be distinguished from "emergency situations" under article 25. While the situations dealt with in the latter article involve, inter alia, an imminent threat, the danger under paragraph 2 of the present article need not be an imminent one, although it should not be so remote as to be de minimis. The requirement that a watercourse State have a "serious reason to believe" that it may suffer adverse effects constitutes an objective standard, and requires that there be a realistic danger. The phrase "serious reason to believe" is also used in article 18 and has the same meaning as in that article. This requirement conforms with State practice, since States generally hold consultations when there are reasonable grounds for concern about actual or potential adverse effects. Finally, the expression "appreciable adverse effects" has the same meaning as in article 12. Thus the threshold established by this standard is lower than that of "appreciable harm". 277/

(4) The obligation to enter into consultations under paragraph 2 applies to appreciable adverse effects that may arise in two different ways. First, such effects may arise from the operation or maintenance of works. Thus, subparagraph (a) provides for consultations concerning the operation or maintenance of works in a safe manner. Second, adverse effects upon other watercourse States may result from damage to water works due to wilful or negligent acts, or due to the forces of nature. Thus, if a watercourse State had serious reason to believe that it could be harmed by such acts or forces, it would be entitled under subparagraph (b) of paragraph 2 to initiate consultations concerning the protection of the works in question from such acts as terrorism and sabotage, or such forces as landslides and floods.

(5) The concern of States for the protection and safety of installations is reflected in international agreements. Some agreements involving hydroelectric projects contain specific provisions concerning the design of installations 278/ and provide that plans for the works may not be carried out

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277/ See para. (2) of the commentary to art. 12, Yearbook ... 1988, vol. II (Part Two), p. 46.

278/ An example is the Convention of 1957 between Switzerland and Italy concerning the use of the water power of the Spöl, art. 8, Legislative Texts, Treaty No. 235, at p. 862; summarized in Yearbook ... 1974, vol. II (Part Two), p. 161, document A/5409, paras. 849-854.

without the prior approval of the parties. 279/ States have also made provision in their agreements for ensuring the security of works through the enactment of domestic legislation by the State in whose territory the works are situated. 280/ Article 28 does not go so far, but lays down general, residual rules intended to provide for basic levels of protection and safety of works related to international watercourses.

Article 29

International watercourses and installations in time of armed conflict

> International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

Commentary

(1) Article 29 concerns the protection to be accorded to, and the use of international watercourses and related installations in time of armed conflict. The article, which is without prejudice to existing law, does not lay down any new rule. It simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning international watercourses and related works. These provisions fall generally into two categories: those concerning the protection of international watercourses and related works; and those dealing with the use of such watercourses and works. Since detailed regulation of this subject matter would be beyond the scope of a framework instrument, article 29 does no more than to refer to each of these categories of principles and rules.

(2) The principles and rules of international law that are "applicable" in a particular case are those that are binding on the States concerned. Just as

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279/ 1963 Convention between France and Switzerland on the Emosson hydroelectric project, art. 2, in Revue générale de droit international public (Paris), 3rd series, vol. XXXVI, No. 1 (January-March, 1965), p. 571; summarized in Yearbook ... 1974, vol. II (Part Two), p. 311, document A/CN.4/274, para. 229.

280/ Ibid., art. 2.

article 29 does not alter or amend existing law, it also does not purport to extend the applicability of any instrument to States not parties to that instrument. On the other hand, article 29 is not addressed only to watercourse States, in view of the fact that international watercourses and related works may be used or attacked in time of armed conflict by other States as well. While a State not party to the present articles would not be bound by this provision *per se*, inclusion of non-watercourse States within its coverage was considered necessary both because of the signal importance of the subject and since the article's principal function is, in any event, merely to serve as a reminder to States of the applicability of the law of armed conflict to international watercourses.

(3) Of course, the present articles themselves remain in effect even in time of armed conflict. The obligation of watercourse States to protect and use international watercourses and related works in accordance with the articles remain in effect during such times. Warfare may, however, affect an international watercourse as well as the protection and use thereof by watercourse States. In such cases, article 29 makes clear that the rules and principles governing armed conflict apply. For example, the poisoning of water supplies is prohibited by the Hague Conventions of 1907 Concerning the Laws and Customs of Land Warfare 281/ and article 54 of Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, 282/ while article 56 of that Protocol protects dams, dikes and other works from attacks that "may cause the release of dangerous forces and consequent severe losses among the civilian population". 283/ Similar protections apply in non-international armed conflicts under articles 14 and 15 of Protocol II Additional to the 1949 Geneva Conventions. Also relevant to the protection of international watercourses in time of armed conflict is the provision of Protocol I that "Care shall be taken in warfare to protect the natural environment against

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281/ Article 23 of the Regulations annexed to the Convention Concerning the Laws and Customs of Land Warfare, in *Am. J.I.L.* vol. 2, (1908), p. 106. For a commentary on art. 23, see L. Oppenheim, *International Law: A Treatise*, 7th ed., H. Lauterpacht, ed. (London, Longman, 1952, vol. 2, p. 340, sect. 110).

282/ Article 54, para. 2.

283/ Article 56, para. 1.

widespread, long-term and severe damage." 284/ In cases not covered by a specific rule, certain fundamental protections are afforded by the "Martens clause". That clause, which was originally inserted in the Preamble of the Hague Conventions of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, 285/ now has the status of general international law. In essence, it provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. The same general principle is expressed in article 10, which provides that in reconciling a conflict between uses of an international watercourse, special attention is to be paid to the requirements of vital human needs.

. . .

Article 32

Non-discrimination

> Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

Commentary

(1) Article 32 sets out the basic principle that watercourse States are to grant access to their judicial and other procedures without discrimination on the basis of nationality or residence.

284/ Protocol I, art. 55, para. 1. A more general provision to the same effect is contained in art. 35 (Basic Rules), para. 3 of the same Protocol.

285/ For example, Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare of 17 June 1925 (Preamble, paras. 1 and 3); the Geneva Conventions of 12 August 1949 (Convention I, art. 63, para. 4; Convention II, art. 62, para. 4; Convention III, art. 142, para. 4; and Convention IV, art. 158, para 4); Protocol I Additional to the 1949 Geneva Conventions (art. 1, para. 2); and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Preamble, para. 5).

(2) The gravamen of the article is that where watercourse States provide access to judicial or other procedures to their citizens or residents, they must provide access on an equal basis to non-citizens and non-residents. This obligation would not affect the existing practice in some States of requiring that non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with their legal systems". As indicated by the words, "has suffered appreciable harm ... or is exposed to a threat thereof", the rule of non-discrimination applies both to cases involving actual harm and to those in which the harm is prospective in nature. Since cases of the latter kind can often be dealt with most effectively through administrative proceedings, the article, in referring to "judicial and other procedures", requires that access be afforded on a non-discriminatory basis both to courts and to any applicable administrative procedures.

(3) One member of the Commission was of the view that the article should apply only to cases involving appreciable harm "in other States" so that the article would be confined to cases involving transboundary harm. The prevailing opinion in the Commission was, however, that the article should be broader in scope, so that it would cover cases such as that of a foreign national who had suffered harm in the territory of the watercourse State in which the source of the harm was situated. The basis for this view is that watercourse States should not discriminate in granting access to their judicial or other procedures, regardless of where the harm occurs or might occur. One member of the Commission found the article as a whole unacceptable on the ground that the articles deal with relations between States and should not extend into the field of actions by natural or legal persons under domestic law.

(4) Precedents for the obligation contained in article 32 may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 provides as follows:

> "Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.
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> "The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out." 286/

The Council of the Organization for Economic Cooperation and Development (OECD) has adopted a Recommendation on Implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4 (a) of that Recommendation provides as follows:

> "Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to

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286/ Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974, art. 3, United Nations, Treaty Series, vol. 1092, p. 279, reprinted in International Legal Materials, vol. XIII, p. 591 (1974). Similar provisions may be found in art. 2, para. 6 of the ECE Convention on environmental impact assessment in a transboundary context, done at Espoo on 25 February 1991, document E/ECE/1250; the Guidelines on responsibility and liability regarding transboundary water pollution, part II.B.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution, document ENVWA/R.45, 20 November 1990; and the Draft ECE Charter on environmental rights and obligations, para. 6, prepared at a meeting of experts on environmental law, 25 February-1 March 1991, document ENVWA/R.38, annex I.

that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status ...". 287/

(5) Article 32 does not require watercourse States to provide a right to compensation or other relief under their domestic law for appreciable harm caused in other States by watercourse-related activities within their territories. The Commission considered including a separate article to cover this point but decided not to at this stage of the work on the topic. Some members, however, held the view that such a provision should have been included in the articles.

287/ OECD document C(77)28 (Final), annex, in OECD, OECD and the Environment (1986), p. 150. To the same effect is principle 14 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, approved in decision 6/14 of the Governing Council of the United Nations Environment Programme (UNEP) of 19 May 1978. A discussion of the principle of equal access may be found in Van Hoogstraten, Dupuy and Smets, "Equal Right of Access: Transfrontier Pollution", Environmental Policy and Law, vol. 2 (1976), p. 77.

CHAPTER IV

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

60. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session, in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

61. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 288/

62. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

63. The General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

64. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the

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288/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. [289]

65. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. [290] The Commission, from its thirty-fifth session, in 1983, to its forty-second session, in 1990, received eight reports from the Special Rapporteur. [291]

66. During these sessions, the Commission took certain preliminary decisions regarding the content *ratione personae* and the content *ratione materiae* of the draft Code. [292] It also referred to the Drafting Committee articles 1 to 17, X and Y contained in the Special Rapporteur's reports. [293] In addition, at those sessions, the Commission provisionally adopted the following articles:

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[289] In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English. Accordingly, the title of the topic in English reads "Draft Code of Crimes against the Peace and Security of Mankind".

[290] For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (*Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10*, (A/38/10), paras. 26 to 41).

[291] *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/364; *Yearbook ... 1984*, vol. II (Part One), p. 89, document A/CN.4/377; *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/387; *Yearbook ... 1986*, vol. II, document A/CN.4/398; *Yearbook ... 1987*, vol. II (Part One), document A/CN.4/404; *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/411; *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr. 1 and 2 (Spanish only); *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/430 and Add.1.

[292] *Yearbook ... 1984*, vol. II (Part Two), p. 17, document A/39/10, para. 65.

[293] For a more detailed account of the Commission's work on the topic at these sessions, see the Reports of the International Law Commission on the work of its thirty-seventh session, (*Official Records of the General Assembly, Fortieth session, Supplement No. 10* (A/40/10), paras. 34 to 101), thirty-eighth session (*Ibid.*, *Forty-first session, Supplement No. 10* (A/41/10), paras. 77 to 185), thirty-ninth session (*Ibid.*, *Forty-second session, Supplement No. 10* (A/42/10), paras. 25 to 66), fortieth session (*Ibid.*, *Forty-third session, Supplement No. 10* (A/43/10), paras. 211 to 280), forty-first session (Ibid., *Forty-fourth session, Supplement No. 10* (A/44/10), paras. 83 to 217) and forty-second session (*Ibid.*, *Forty-fifth session, Supplement No. 10*, (A/45/10, paras. 27 to 158).

1 (Definition); 2 (Characterization); 3 (Responsibility and punishment); 4 (Obligation to try or extradite); 5 (Non-applicability of statutory limitations); 6 (Judicial guarantees); 7 (Non bis in idem); 8 (Non-rectroactivity); 10 (Responsibility of the superior); 11 (Official position and criminal responsibility); 12 (Aggression); 13 (Threat of aggression); 14 (Intervention); 15 (Colonial domination and other forms of alien domination); 16 (International terrorism); 18 (Recruitment, use, financing and training of mercenaries) and X (Illicit traffic in narcotic drugs), with the commentaries thereto. 294/

B. Consideration of the topic at the present session

1. Consideration of the Special Rapporteur's ninth report

67. At the present session, the Commission had before it the Special Rapporteur's ninth report on the topic (A/CN.4/435 and Add. 1 and Corr. 1), which consisted of two parts. In Part One, the Special Rapporteur dealt with "penalties applicable to crimes against the peace and security of mankind". In this part of his ninth report, the Special Rapporteur pointed out that the principle *nulla poena sine lege* required that provision should be made for penalties in the draft Code, an undertaking which, however, entailed certain difficulties tied in with the diversity of legal systems or with procedural problems. In the case of difficulties related to the diversity of legal systems, the Special Rapporteur indicated that, whereas in domestic law, there was in each State a certain unity of moral and philosophical concepts that justified a single system of punishment applicable to all offences, in international law the diversity of concepts and philosophies was such as to be hardly conducive to a uniform system of punishment. Certain punishment current in some countries was unknown in others. As examples of this diversity, he examined in particular the differing attitudes in various countries and regions of the world towards the death penalty and towards other afflictive penalties, such as physical mutilation. He concluded that it was extremely difficult to institute a single internationally and uniformly applicable system of punishment. As to procedural difficulties, the Special Rapporteur wondered whether a penalty should be specified for each crime against the peace and security of mankind or whether, since all of the

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294/ For the text of the articles see Section D.1 below.

crimes in question were marked by the same degree of extreme seriousness, a general formula should be adopted which stipulated the same penalty for all crimes, with a minimum and a maximum, depending on whether or not there were extenuating circumstances. Other procedural problems lay in determining whether the provisions of the Code, including those on penalties, should be directly incorporated into domestic law or whether penalties should be included in the Code itself, which would be adopted by an international convention. The Special Rapporteur favoured the latter solution. He submitted, at the end of Part One, a single draft article (draft art. Z) on penalties applicable to all crimes against the peace and security of mankind.

68. In Part Two of his ninth report, the Special Rapporteur pointed out that, on the one hand, in resolution 45/41 of 28 November 1990, the General Assembly invited the Commission "to consider further and analyse the issues raised in its report on the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism". On the other hand, the General Assembly had refrained, at least at that stage, from choosing between resort to a system of universal jurisdiction, the establishment of an international criminal court or the establishment of some other trial mechanism. Consequently, the Special Rapporteur did not submit a draft statute for an international criminal court. He none the less wanted a more in-depth discussion in the Commission of two major issues that had to be solved in order to provide him with the necessary guidance in drafting a possible statute. The two issues were the court's jurisdiction, and the requirements for instituting criminal proceedings. Accordingly, he submitted in his report two draft provisions on these two issues that were intended as a basis for discussion and would perhaps reveal an overall trend that would be a useful guide to him.

69. The Commission considered the Special Rapporteur's ninth report at its 2207th to 2214th meetings. After hearing the Special Rapporteur's presentation, it considered draft article Z, on applicable penalties, and the part of his report on the possible establishment of an international criminal court. At its 2214th meeting, the Commission decided to refer draft article Z to the Drafting Committee for consideration in the light, more particularly, of the specific proposals made by members of the Commission, including the

Special Rapporteur, during the discussion. The comments and observations made in relation to the Special Rapporteur's ninth report are summarized in subsections (a) to (c) below.

(a) Penalties applicable to crimes against the peace and security of mankind

70. In his ninth report and in his introduction to Part One on penalties applicable to crimes against the peace and security of mankind, the Special Rapporteur recalled that he had discussed the question of penalties in his eighth report when he had submitted three versions of a possible draft provision 295/ which was designed to give rise to debates in the Commission and not to be regarded at that stage as final. Since some members of the Commission had pointed out that penalties should appear in the Code itself and not in the statute of the proposed court, he was now proposing a draft article Z on applicable penalties 296/ for inclusion in the draft Code.

71. The Special Rapporteur noted that the applicable penalties raised fairly delicate problems, as evidenced by the fact that, when confronted with the criticisms of Governments, the Commission had withdrawn draft article 5 dealing with the question from the 1954 draft Code. At its third session in 1951, the Commission had thus adopted a draft article 5, which read as follows: "The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence". However, that provision had the drawback of leaving it to the judge to determine the applicable penalty and, in the light of the strong reservations of the

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295/ A/CN.4/430/Add.1, paras. 27 to 31.

296/ Draft article Z as submitted by the Special Rapporteur reads as follows:

> "Any defendant found guilty of any of the crimes defined in this Code shall be sentenced to life imprisonment.
>
> If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 10 to 20 years.
>
> [In addition, the defendant may, as appropriate, be sentenced to total or partial confiscation of stolen or misappropriated property. The Tribunal shall decide whether to entrust such property to a humanitarian organization.]"

Governments which had communicated their comments to the Commission, 297/ the Commission had finally decided that it would be advisable to withdraw the provision from its text.

72. According to the Special Rapporteur, the applicable penalties gave rise to two kinds of problems: methodological problems and problems arising from the diversity of national legal systems.

73. With regard to methodological problems, the Special Rapporteur placed particular emphasis on the question whether the relevant penalty should be indicated for each crime - genocide, war crimes and so on - or, since all such crimes were characterized by their extreme gravity, whether the same penalty should be laid down under a general formula for all cases, with a minimum and a maximum according to whether or not there were extenuating circumstances. The Special Rapporteur had decided to opt for the latter solution, since, in his view, it would be impossible to establish a scale of penalties for each crime taken separately.

74. With regard to the problems raised by the diversity of legal systems, the Special Rapporteur pointed out that the establishment of a scale of penalties called for a uniform moral and philosophical approach that existed in internal, but not in international, law. Penalties varied from one country to another, according to the offences to be punished. In addition, there were penalties such as the death penalty and other afflictive punishments (for instance, physical mutilation) about which there was much controversy and which were not universally applied.

75. The Special Rapporteur had therefore endeavoured to avoid extremes and to find a middle road that might be acceptable to all States. His proposal was that life imprisonment should be the punishment imposed for the crimes defined under the Code. Reservations about that kind of punishment had been expressed at the Commission's preceding session by those who considered that it precluded all possibility of the improvement and rehabilitation of the convicted person, but it seemed to be the solution that met with wide agreement. If extenuating circumstances were allowed, a penalty of 10 to 20 years' imprisonment would be possible.

297/ See document A/CN.4/435 and Corr.1, paras. 18 to 22.

76. In the Special Rapporteur's opinion, draft article Z which he was submitting was a step forward compared to the draft provision prepared and withdrawn by the Commission in the 1950s (see para. 71 above) in the sense that the applicable penalty would not be determined by the competent judge, but would be prescribed for all crimes covered by the Code itself. That penalty could be supplemented by an optional one which had been placed in square brackets in the report, namely, total or partial confiscation of property which the convicted person might have stolen or misappropriated. That penalty, already provided for in the Charter of the Nürnberg Tribunal, would be particularly applicable in the case of war crimes, which often involved theft or appropriation by force of property belonging to private individuals, especially in occupied territories. As to whom the confiscated property would be awarded to, the Special Rapporteur had noted that, at the national level, confiscated property went to the State, whereas, at the international level, it would be difficult to award it to one State rather than to another. He was therefore proposing that it should be left to the competent court to entrust such property to a humanitarian organization such as UNICEF, ICRC or an international body set up to combat illegal drug trafficking.

77. The general feeling in the Commission was that the draft Code should contain provisions on applicable penalties.

(i) Inclusion of penalties in the draft Code or reference to the internal law of States

78. The majority of the members considered that the penalties should be included in the Code itself and that reference should not simply be made to the internal criminal law of the States parties to the Code. It was noted in that regard that the inclusion of penalties in the Code itself, which would be adopted by means of an international convention, was more in keeping with the principle nulla poena sine lege and essential to the uniform application of the penalties prescribed, thus avoiding the drawbacks resulting from the diversity of national systems in matters relating to penalties. Moreover, the solution of leaving it to the court to determine the penalty to be imposed might not only create problems resulting from the lack of uniform application, but might also make the Code incomplete by characterizing certain acts as crimes without stating what the consequences would be for the guilty parties, thereby weakening the Code as a whole. It was also pointed out that, unlike

article 15, paragraph 2, of the International Covenant on Civil and Political Rights, which referred to the general principles of law, the inclusion of penalties in the Code would make it possible to avoid such a reference to justify instituting proceedings against the author of a crime that affected the entire international community.

79. Some members nevertheless believed that, as far as penalties were concerned, the solution of referring to the internal law of States would be better and they questioned the wisdom of seeking to design a system of uniform sentences for a heterogeneous world. One member in particular pointed out that, in acceding to an international convention providing for penalties, some States would have procedural and philosophical problems and would have to make drastic changes in their penal codes with respect to penalties for crimes which might be punished under their internal law more lightly than under the draft Code. He questioned whether that might not affect the degree to which the draft Code would be acceptable to such States. Another member was of the opinion that the best solution would be to let the States concerned deal with the question of penalties in accordance with their internal law. In order to prevent any possible abuses, the Code might include a general provision requiring that crimes should be punished by sentences that took into account their extreme gravity. All conventions against terrorism incorporated such a provision and it had worked reasonably well.

(ii) A single penalty or a penalty for each crime

80. Although the majority of the members of the Commission were in favour of the determination of the applicable penalties in the Code itself, there were two major trends: one in favour of the establishment of separate penalties depending on the crime in question; and the other in favour of a single penalty, with a minimum and a maximum to be determined by the court according to the circumstances of each case. In this connection, however, one member felt that it might be advisable not to set a minimum penalty in the draft Code so as to allow the competent tribunal, in sentencing, to better take into account the specific circumstances of each case.

81. The members in favour of the establishment of separate penalties for each crime drew attention to the specific and individual nature of each crime covered by the draft Code. In their opinion, crimes such as genocide, aggression, apartheid and colonialism, for example, could not be viewed in the same way as drug trafficking or mercenarism. The crimes covered by the Code

therefore warranted severe, but differentiated, sentences. The gravity of the penalties would depend on the nature of the crime and the circumstances in which it had been committed. It should not be left to the judge to decide that question, but it should be dealt with in the Code itself, taking each crime separately and setting a minimum and a maximum penalty for each crime.

82. The members who preferred the establishment of a single penalty with a maximum and a minimum were of the opinion that the criterion which made it possible to include some crimes in the draft Code was their extreme gravity, the fact that they were the most serious of the most serious crimes. Some crimes, such as aggression or genocide, might be regarded as more serious than others, but those differences could be taken into account by the leeway that the establishment of a single penalty with a minimum and a maximum would allow the court. One member, in particular, invoked practical reasons. In his opinion and in theory, the ideal solution would be to have a penalty for each crime because, although the crimes under the Code were characterized by their extreme gravity, their degree of gravity could vary. Justice and fairness therefore required that the crime should be punished according to its degree of gravity and the degree of responsibility of its author. However, that ideal solution was probably impossible to apply and it would also entail endless debates to determine each of the crimes, their gravity and the corresponding applicable penalty. Thus, in practice and to be realistic, the Commission had no other choice than to establish the principle of a single penalty for all crimes.

(iii) The type of applicable penalties

83. The Commission then held a lengthy debate on the nature of the penalties to be provided for in the Code or, in other words, on the question of what the penalties under the Code should be. The death penalty, the penalty of imprisonment, other possible penalties, the gradation of such penalties and the solutions proposed by the Special Rapporteur in his draft article Z were discussed in detail by members.

The death penalty

84. Many members of the Commission supported the Special Rapporteur's position that the death penalty should not be included among the penalties applicable to crimes against the peace and security of mankind. In that connection, it was indicated that the Commission should not seek to resist the worldwide trend towards the abolition of the death penalty, even for the most serious

crimes, such as genocide. The move away from the death penalty had been evidenced in legal thinking since the Nürnberg and Tokyo trials. In the opinion of those members, the abolition of the death penalty was a step forward in moral terms that had to be consolidated. The death penalty was unnecessary and pointless and no one had the right to take another's life. In addition, that penalty had been eliminated long ago in many national legislations and the States which had abolished it would be reluctant to accede to an instrument which re-established it. In many of those countries, the abolition of the death penalty had become a constitutional principle and some international instruments, which were either universal or regional in scope, also provided for its abolition or for a prohibition on its reintroduction. The following instruments were cited: the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (General Assembly resolution 44/128), Additional Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocol to the American Convention on Human Rights relating to the abolition of the death penalty.

85. Some other members expressed reservations on that position, believing that it would be premature for the Commission, which was called upon to legislate for States which did not have the same ideas on the death penalty, to adopt a clear-cut opinion on the question instead of allowing the States concerned to exercise discretion. Many States still retained the death penalty in their internal law for particularly heinous crimes. Failure to include the death penalty in the draft Code was bound to give rise to discussion among those States and would risk rendering the Code less acceptable to them. Some members expressed the view that even certain regional instruments providing, in principle, for the abolition of the death penalty allowed for exceptions in certain circumstances. For example, Optional Protocol No. 6 to the European Convention referred to earlier, which provided for the abolition and non-restoration of the death penalty in peacetime, also contained a proviso for the case of war and for the case of "imminent threat of war", which, in the view of some writers, the authorities of the State concerned would be free to determine. Moreover, the Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the General Assembly, was, as its name indicated, optional and in no way mandatory. The draft Code dealt only with the most serious of the most

serious crimes and should not be turned into an instrument for settling the question of capital punishment. In the view of those members, leaving the question to the discretion of States would in no way undermine the principle _nulla poena sine lege_. All that was needed was to include in the Code a general provision to the effect that such crimes should be punished in proportion to their degree of gravity. One member in particular suggested that, in order to accommodate the sensibilities of States which had abolished the death penalty, the article of the Code providing for that penalty could be accompanied by a reservation entitling any State instituting proceedings to request the Court not to impose the death penalty in the event of a conviction.

Life imprisonment

86. With regard to the _first paragraph_ of the draft article submitted by the Special Rapporteur, some members of the Commission expressed a preference for the penalty of life imprisonment, which a number of them saw as the only penalty which could render the abolition of the death penalty acceptable and had the advantage of being reversible in the event of an error being made. They pointed out that the international community should take pains to emphasize the exemplary nature of the penalty applicable to persons committing barbarous crimes, in order to prevent the recurrence of such acts and to protect human rights and fundamental freedoms. That was the criterion which formed the basis of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)), the Declaration on Territorial Asylum (art. 1) (General Assembly resolution 2312 (XXII)) and General Assembly resolution 3074 (XXVIII) on the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. Some of these members found it difficult to contemplate the release of dictators who had been guilty of aggression, genocide or other equally serious crimes, even after 20, 25 or 30 years of imprisonment, or even the release of a major drug trafficker. The release of such individuals was unthinkable. It was a question of fitting the penalty not only to the crime, but also to the gravity of the danger, and of preventing a recurrence at all costs. Dictators surviving a defeat tended to revert to type, if not on their own initiative then with the encouragement of former allies or supporters.

87. Another argument put forward in favour of life imprisonment was that most countries abolishing the death penalty accepted life imprisonment as

a substitute. The adoption of such a penalty would avoid arousing strenuous objections on the part of States still advocating the death penalty and might even encourage them to gradually eliminate it from their internal law.

88. Other members expressed reservations regarding life imprisonment on the ground that it, too, had been abolished in many countries as contrary to certain fundamental principles of human rights. Some of those members considered the purpose of punishment to be justice, not blind retribution. With the passage of time and once the offender had ceased to be a danger, the public desire for retribution ought to fade. To impose a life sentence on an elderly person, with no possibility of remission, did no credit to the conscience of mankind, and many countries had adopted machinery for granting mercy or parole.

Temporary imprisonment

89. Several members were in favour of laying down maximum and minimum penalties and giving the court leeway to decide on the length of the term of imprisonment on the basis of the gravity of the crime and the circumstances of each individual case. Various members suggested 25, 30, 35 and 40 years as maximum terms and 10, 14 and 15 years as minimum terms.

90. While some members thought that the sentence should be without appeal and that the prisoner should under no circumstances be allowed to apply for release before having served his full sentence, other members were of the view that he should be eligible for remission of his sentence or for conditional release for good behaviour. One member proposed the creation of an international clemency and parole board which could not consider release until the prisoner had served at least two thirds of his sentence.

91. In connection with temporary imprisonment, several members made observations regarding paragraph 2 of the draft article proposed by the Special Rapporteur. While accepting the idea of the adjustability of the penalty as proposed in the paragraph, they held the view that the court should be allowed leeway to take account of the presence or absence not only of extenuating circumstances, but also of aggravating circumstances and, indeed, of any other pertinent circumstances such as the personality of the perpetrator, the occasion on which the act had been committed, the gravity of its effects and the distinction between principals or persons who had played a leading role in the perpetration of a crime and subordinates who had acted under orders. Some members said that the aggravating circumstances which

should be taken into account in determining the penalty should include non-observance of Security Council resolutions, particularly monstrous conduct on the part of the accused, premeditation, planning and methodical execution, such as a programme of genocide, and that the extenuating circumstances should include simple attempt or partial exemption from criminal responsibility of the accused.

92. With respect to terminology, the word "imprisonment" used by the Special Rapporteur in paragraphs 1 and 2 of his draft article was considered "vague" by some of the members who pointed out that the internal law of a number of countries provided for numerous forms of imprisonment such as rigorous imprisonment and detention. Those members therefore preferred a more neutral term such as "deprivation of liberty".

Confiscation

93. Several members made observations on paragraph 3 of the Special Rapporteur's proposed draft article, which dealt with the confiscation of stolen property.

94. Those members were of the view that, as it stood, the paragraph really embodied not a penalty, but simply a provision for restitution without any afflictive effect. A distinction should be drawn between confiscation for the purposes of restitution and confiscation as a penalty.

95. Even in its current form and strictly from the standpoint of confiscation for restitution, the paragraph raised a number of difficulties which were noted by these members. Firstly, the term "misappropriated property" appeared to include "stolen property", making the second term redundant. Secondly, profits deriving from misappropriated property should also be confiscated. Thirdly, it was difficult to see why the confiscation of such property might be only partial, and the argument put forward in that respect in paragraph 33 of the report was hardly convincing: neither the offender himself nor his spouse or his heirs should benefit from the misappropriated property. Fourthly, although the idea was indeed praiseworthy, it was difficult to see by what principle the court should entrust the property in question to a humanitarian organization. Stolen property must be restored to its rightful owner. It was only in the very special case when the owner of the property had died without leaving any heirs that the problem of the disposition of the property would arise.

96. Several members suggested that the draft article should provide for the confiscation of property either as a complementary penalty, i.e. as a penalty

provided for in the Code but applicable at the discretion of the court, or as an accessory penalty, in which case it would automatically be added to the principal penalty, namely imprisonment. Those members felt that the penalty of confiscation could take either form, depending on the circumstances. Cases were conceivable in which the penalty would be imposed automatically, for example, confiscation of objects used to commit the crime in question, the means of producing and transporting narcotic drugs, the products of criminal activity, and the property and profits illegally acquired through that activity; in other cases confiscation would be optional.

97. Several suggestions were made by members regarding the possible beneficiary of property, either in cases where pillaged goods had been confiscated and there was no rightful owner or heir, or in the event of confiscation as a criminal penalty. It was suggested, therefore, that such property could be allocated, in the first instance, to reparation of damages suffered by the victims of the crimes in question or to the injured State. A number of members supported the Special Rapporteur's suggestion that such property should be entrusted to a humanitarian organization such as the International Committee of the Red Cross, the United Nations Children's Fund (UNICEF), an international organization combating illicit international drug trafficking, or the World Food Programme (WFP). Other members suggested that such property could be allocated to a fund for the financing of United Nations peace-keeping operations, or even to a fund of the Secretary-General to help States without the necessary financial resources to have recourse to the International Court of Justice. One member suggested that such property, if not returned to the rightful owners because they could not be traced, should be turned over to the State to be allocated to such charities as the State might determine. One member suggested that property confiscated from drug traffickers should be made available to centres for the treatment of drug addicts. One member in particular suggested that such property should be entrusted to a trust, given to the State trying the offender or to the State asked to implement the sentence of the court, or simply held in the custody of the international criminal court itself.

Other possible penalties

98. Some members suggested that the penalties of imprisonment and confiscation proposed by the Special Rapporteur should be supplemented by other penalties. It was pointed out that, given the nature of the crimes

in question, the criminal penalties should be both afflictive, affecting the actual life of the guilty person, and infamous, in that they should affect his moral reputation, legal and political status and family and social situation. It would be difficult to treat the perpetrator of such crimes more leniently than the perpetrator of an ordinary crime or of the traditional kind of political crime. One member, for example, suggested that the draft Code should provide for the accessory penalties of total legal incapacity and deprivation of civil rights. Other members suggested fines and community service. One member noted that a fine virtually amounted to a form of confiscation. Some members were of the view that the question of community service should be approached with the utmost caution, since it was difficult to draw a line between the penalty proposed and forced labour, which was prohibited under specific human rights conventions.

(iv) Conclusions by the Special Rapporteur

99. Referring to the various observations made by members, the Special Rapporteur noted the lack of unanimity on the question of applicable penalties.

100. In the view of some members, the determination of applicable penalties was a matter of internal law and should not be dealt with by the Commission. He did not share that view. In his opinion, the Commission could certainly make proposals on the application of penalties and even suggest specific penalties without encroaching on the prerogatives of States, with which the decision would, in the final analysis, rest. If the Commission did not deal with the question of applicable penalties, it would run the risk of attracting the same criticisms as the authors of the 1954 Code, who had been reproached for drafting provisions on crimes without providing for penalties, in total disregard of the nulla poena sine lege rule.

101. Regarding the reactions to his draft article on applicable penalties, the Special Rapporteur noted that, once again, positions were fairly clear-cut. Some members of the Commission considered that, given the trends in international law, the death penalty was obsolete and should not be included on moral, constitutional, conventional and other grounds. Some members even went as far as to exclude life imprisonment. In his view, that would be going too far. It should not be forgotten that the crimes covered by the Code were of exceptional gravity and required an exceptional régime. That had, moreover, been recognized by the Commission when it had decided, contrary to all the principles of criminal law, that no statutory limitation should apply

to such crimes. In the Special Rapporteur's view, if the death penalty were not to be included in square brackets in the draft article, then life imprisonment at least should be retained.

102. The Special Rapporteur had decided, after due consideration, not to include the concept of aggravating circumstances, for the simple reason that, in view of the gravity of the crimes in question, it was difficult to see how there could be any such circumstances.

103. The reason he had proposed a provision of a general nature on penalties that was applicable to all the crimes covered by the Code was because, as he saw it, all those crimes were extremely serious and could therefore be placed on the same footing. That provision was, however, not as rigid as it might seem because, since account was being taken of extenuating circumstances, it would always be possible for the judge to adjust the penalty.

104. With regard to the confiscation of property, the Special Rapporteur admitted that the wording proposed in the text of draft article Z was not altogether satisfactory. It might be better to provide for the total confiscation of property and not to regard confiscation as a form of compensation, in which case it would be for the injured party, where appropriate, to institute proceedings to obtain compensation.

105. The Special Rapporteur indicated that, in view of the comments made during the discussion, he had prepared two new versions of draft article Z. [298]

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[298] The two new versions of draft article Z submitted by the Special Rapporteur read as follows:

First version

"Any person convicted of any of the crimes covered by this Code shall be sentenced to [life imprisonment] imprisonment for a term of 15 to 35 years which cannot be commuted, without prejudice to the following other sentences, if deemed necessary by the court:

1. Community work;
2. Total or partial confiscation of property;
3. Deprivation of some or all civil and political rights."

Second version

"1. The court may impose one of the following penalties:

(b) The jurisdiction of an international criminal court

106. In his ninth report and in the course of submitting the second part of the report, the Special Rapporteur said that, in the light of the considerations set out in paragraph 68 above, he had developed more particularly in his report the question of the jurisdiction of an international criminal court. The question had been considered a number of times in the United Nations, and especially by the 1953 Committee on International Jurisdiction, which had produced a revised draft statute for an international criminal court. 299/ The Special Rapporteur had drawn on article 27 of that text, with a number of changes and additions, in preparing a possible draft provision, intended to provide a basis for a more thorough discussion that would serve as a guide for him later on. 300/ The draft provision was not, therefore, intended for referral to the Drafting Committee.

[(a) Life imprisonment;]
(b) Imprisonment for a term of 10 to 35 years which cannot be commuted.

2. In addition, the court may order:

(a) Community work;
(b) Total or partial confiscation of property;
(c) Deprivation of some or all civil and political rights."

299/ *Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645), annex.

300/ The possible draft provision read as follows:

"The jurisdiction of the Court

1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security of mankind [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction upon it.

2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been

107. Referring to paragraph 1 of the possible draft provision he had prepared, the Special Rapporteur said that the paragraph first established that the court was competent to try individuals, in other words natural persons, rather than States, and formulated a rule relating to jurisdiction *ratione materiae*. The paragraph provided two options: the court tried crimes defined in the Code or it tried crimes defined in the annex to its statute, which would, of course, be far fewer in number than those in the Code. His own view was that it would be a mistake to be too ambitious as far as the court's jurisdiction *ratione materiae* was concerned, for all the discussions had pointed to some hesitation in that regard. It was better to proceed cautiously and flexibly, starting, for example, by restricting the court's competence to crimes forming the subject of international conventions, on which general agreement therefore existed, such as genocide, apartheid, certain war crimes, certain acts of terrorism - for instance attacks on persons and property enjoying diplomatic protection - and drug trafficking, which should be listed in an annex to the statute of the Court.

108. As to the question of conferment of jurisdiction by States, the Special Rapporteur, although pointing out that he was opposed in principle to that rule, none the less said that international realities made it difficult to dispense with it. In the case under consideration, the rule could involve four States: the State in whose territory the crime had been committed, the victim State (or the State whose nationals had been victims of the crime), the State of which the perpetrator of the crime was a national, and the State in whose territory the perpetrator had been found. For the latter State, the

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> the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals.
>
> 3. The Court shall have cognizance of any challenge to its jurisdiction.
>
> 4. Provided that jurisdiction is conferred upon it by the States concerned, the Court shall also have cognizance of any disputes concerning judicial competence that may arise between such States, as well as of applications for review of sentences handed down in respect of the same crime by the courts of different States.
>
> 5. The Court may be seized by one or several States with the interpretation of a provision of international criminal law."

decision whether or not to extradite was, in fact, tantamount to recognition or non-recognition of the court's jurisdiction. The problem therefore arose only in connection with the other three States. The 1953 draft statute had required conferment of jurisdiction by two States: the State in whose territory the crime had been committed and the State of which the perpetrator of the crime was a national. The possible draft provision was less rigid. Paragraph 1 unreservedly reaffirmed the principle of territoriality in the sense that conferment of jurisdiction by the State in whose territory the crime had been committed was obligatory. Having established that principle, he had also wished to introduce the principle of active or passive personality, which was beginning to be widely applied. Many States recognized that they were competent in certain cases, even though the crime had not been committed on their territory. Paragraph 2 therefore provided that conferment of jurisdiction by the State of which the perpetrator was a national or by the victim State or by the State whose nationals had been victims of the crime could be required only if the domestic legislation of those States so demanded in the case in point. The fact that so many States were required to confer jurisdiction also added to the number of obstacles, but it was States that determined their own rules on jurisdiction. In his opinion, setting those rules aside completely might be an attractive idea in theory, but it was not feasible in practice.

109. The Special Rapporteur said that the possible draft provision he had prepared also provided that the court should have cognizance of any challenge to its own jurisdiction (para. 3), that it should have cognizance of any disputes concerning judicial competence as well as of applications for review of sentences handed down in respect of the same crime (para. 4) and that it might be seized with the interpretation of a provision of international criminal law (para. 5). In the latter case, the court's intervention would help to remove some uncertainties regarding terminology and to explain the meaning and content of the many principles which international criminal law, a new field, borrowed from internal criminal law.

110. Many members endorsed the Special Rapporteur's prudent approach in preparing exploratory draft articles on two very important aspects of a possible statute for an international criminal court, even in the absence of a specific request from the General Assembly in that regard. They took the view that the wording of General Assembly resolution 45/41 fully justified that

approach. Some members, however, thought the Commission should wait for a clear and specific request from the General Assembly before embarking on further work on the subject of establishing an international criminal court. Other members took the view that uncertainties regarding the extent of the Commission's mandate concerning institutional and procedural questions were no longer justified, more particularly in view of paragraph 3 of General Assembly resolution 45/41. In the opinion of those members, the Commission should decide when to consider the question of an international criminal court in depth and to adopt a position, within the confines of its consultative function, on the possibility of creating an international criminal court or other international criminal trial mechanism.

111. A number of members spoke in favour of the establishment of a court, something which, as the Commission had pointed out at its previous session, would mark a step forward in developing international law and which, if it enlisted broad support from the international community, would strengthen the rule of law throughout the world. In their opinion, the establishment of an international criminal court could alone provide the required objectivity and impartiality in applying the Code, and without those factors there could be no valid and lasting international order. Those members emphasized that recent events as well as initiatives taken by a number of countries had helped to advance the idea of an international criminal court.

112. One member, in particular, although he favoured the establishment of a permanent international criminal court as the best course, thought it was the most difficult to follow. To get around those difficulties, he considered that initially, and as a provisional solution it would be possible and desirable to set up a tribunal consisting not only of national judges but also foreign judges, for example, from the victim State, the State of the nationality of the accused or the State in whose territory the crime had allegedly been committed (if that was not the State of prosecution) and, possibly, one or more judges from different States or legal systems. A solution of that kind might help to reassure all concerned that the proceedings were impartial. One member favoured the establishment of an international criminal court on an interim basis to fill the present gap resulting from the absence of an international criminal jurisdiction.

113. As to paragraphs 1 and 2 of the possible draft provision prepared by the Special Rapporteur on the court's jurisdiction, a number of members pointed

out that they dealt essentially with three different questions. The first was the nature or extent of the court's jurisdiction, namely whether it would be exclusive jurisdiction, concurrent jurisdiction with national courts, or jurisdiction to hear appeals against judgements by national courts. The second question was jurisdiction ratione materiae, in other words, the crimes that the court would be called upon to try. The third question was conferment of jurisdiction on the court, in other words, whether the consent of some States was necessary for the Court to be able to deal with a case.

(i) Nature or extent of jurisdiction

114. On the question of whether or not jurisdiction should be exclusive, a number of members found that the draft provision, without expressly saying so, took the principle of concurrent jurisdiction with national courts as its point of departure. It was said in this connection that it was a compromise solution, doubtless more acceptable in the eyes of a number of States since it did not prejudice their sovereignty in judicial matters. States would be free to bring proceedings, either before their own courts or before the international court. The international criminal court would have jurisdiction only in cases where national courts declared that they were not competent. Again, some members entered strong reservations with regard to that solution, which, in their view, was complex and delicate, since it called for careful examination of ways of combining the jurisdiction of national courts and of the international criminal court, in order to avoid, more particularly, conflicts of jurisdiction that might, depending on the course of events, lead to paralysis and injustice. That possibility of concurrent proceedings could give rise to unfortunate consequences.

115. Other members said that the simplest solution would be for the international criminal court to have exclusive jurisdiction, something that would eliminate, or at least solve, the many complex problems that would lead to conflicts of jurisdiction between the court and national courts. It remained to be seen whether the solution was acceptable to States at the present stage. The General Assembly had not wanted to take a decision in that connection and States seemed to be fairly divided on the matter. Some members said that the argument that States would not abandon their judicial sovereignty and would prefer to retain the right to try all crimes, however grave - particularly if it meant conferring such jurisdiction on an international court on a case-by-case basis as and when they wished - was not

convincing. In their opinion, that reasoning, if carried through, would inevitably lead to the conclusion that the establishment of an international criminal court worthy of the name smacked of utopia. Such a system was bound to give rise to conflicts that it would be difficult, if not impossible, to solve. In the opinion of some members, it should be realized that the principle of sovereignty was no longer as absolute as it had been in the past. To invoke the concept of sovereignty in order to rule out exclusive jurisdiction did not seem to be in line with present trends. Accordingly, the Commission should seriously consider the advantages and the drawbacks of exclusive jurisdiction and look for a solution that would provide the General Assembly with the broadest range of possible solutions regarding jurisdiction.

116. Some members were in favour of jurisdiction to review (either on appeal or on cassation) decisions handed down by national courts, something which, in their opinion, would enable the court to unify the punishment of international crimes and ensure impartiality and objectivity in prosecution. Such a solution would also entail a preventive role in that it would encourage national courts to be more careful and watchful in applying the norms of international law. In response to arguments by some members who expressed doubts about the possibility of States agreeing to international supervision of judgements handed down by their courts, and in particular by higher courts such as a supreme court, the members who were in favour of a review jurisdiction said that all existing complaints procedures in the human rights field came into play only when domestic remedies had been exhausted and human rights courts and committees dealt solely with cases that had been the subject of a final decision by the national courts. In other words, such courts and committees merely reviewed State practice as revealed in the decisions of the highest courts of the country concerned. Those members asked why something that was feasible in the case of torture or inhuman or degrading treatment should not be possible for all crimes against the peace and security of mankind. In their view, the idea of an international criminal court which had a function to review national court decisions and had advisory powers was therefore realistic and should be pursued.

117. Lastly, many other members of the Commission were in favour of a mixed solution that would take account of the nature of the crime in determining the extent of the court's jurisdiction. In the opinion of those members, the

crimes set out in the Code should be split into two major categories. The court would have exclusive jurisdiction for the first category, and concurrent jurisdiction for the second. Members who were in favour of that solution were not all agreed on which category of crimes should fall within the exclusive jurisdiction of the court. For example, one member held that the court should have exclusive jurisdiction over crimes against peace and crimes against humanity, and concurrent jurisdiction over war crimes and the crime of illicit traffic in narcotic drugs. Other members said that crimes against peace should fall within the exclusive jurisdiction of the court, but all the other crimes should form the subject of concurrent jurisdiction. Another member was of the view that exclusive jurisdiction should be reserved in particular for crimes under international conventions which stipulated that the perpetrators were to be tried by an international tribunal, such as the crime of genocide. As a general criterion, some members said that the court's jurisdiction should be exclusive in cases where the national courts (either the courts of the place where the crime had been committed or those of the State of which the perpetrator was a national or those of the State of which the victim was a national) might well fail to act with the requisite impartiality and objectivity, and its jurisdiction could be concurrent with national courts in other cases.

(ii) Jurisdiction ratione materiae

118. Besides the question of the nature of the court's jurisdiction, some members commented on the question of the court's jurisdiction *ratione materiae*, which was covered by paragraph 1 of the Special Rapporteur's possible provision.

119. Some members favoured a position which would confine the court's jurisdiction, as the Special Rapporteur had envisaged in the passage in square brackets in paragraph 1, to a very small category of crimes of extreme gravity. Some of those members said that the crimes in question could be those defined by international conventions in force, such as the convention on genocide. Those members considered that the advantage of such a solution was that it would, for some States, make the idea of setting up an international criminal court more acceptable.

120. Another position was to extend the court's jurisdiction not only to crimes under the Code but also to other international crimes in general.

121. A further view was that the court's jurisdiction should encompass all of the crimes covered by the Code. With regard to the position reflected in paragraph 119 above, those members considered that nothing warranted any selectiveness, unquestionably inequitable, whereby some crimes alone would fall within the court's jurisdiction. In opposition to the position reflected in paragraph 120 above, those members said that international crimes other than those covered by the Code were not sufficiently serious as to fall within the jurisdiction of an international court. Again, those members took the view that the constituent elements of such other international crimes were not adequately identified and the court's task would become impossible if it had to take cognizance of them.

(iii) Conferment of jurisdiction

122. The third major question raised by paragraphs 1 and 2 of the draft provision was conferment of jurisdiction on the court, namely, whether the consent of some States was needed for the court to be able to deal with a case.

123. Some members endorsed the Special Rapporteur's approach, as reflected in both of the paragraphs. One member said that States were very cautious when dealing with matters that touched on their sovereignty. Accordingly, acceptance of the statute of an international criminal court did not imply automatic consent to the court's jurisdiction. A separate expression of consent would be needed by means of a convention, special agreement or unilateral declaration, as provided for in article 26 of the 1953 draft statute for an international criminal court. A State should be able to choose national criminal jurisdiction despite its overall consent to confer jurisdiction on an international court. Those members endorsed the idea of combining the principles of territoriality, active and passive personality and real protection, while giving priority to the principle of territoriality, for, in their opinion, such a system had more advantages than drawbacks inasmuch as it preserved State sovereignty and the principle of territoriality was the rule in most States. One of those members, in particular, said that the benefit of that approach outweighed the possible drawbacks of, in some cases, the trial being conducted by the State that might have ordered the criminal act, or in others, by the victim State.

124. A number of other members could agree to the solution proposed by the Special Rapporteur in his possible draft provision, but they had very serious reservations regarding paragraph 2. Even in the case of paragraph 1, those

members' interpretation was not always similar. One member interpreted paragraph 1 as meaning that the court would have jurisdiction to deal with crimes defined in the Code and committed in the territory of a State party. The parties to the Code could not, therefore, claim to confer universal jurisdiction on the court. Another member, however, interpreted paragraph 1 as meaning that a State's ratification or acceptance of the court's statute reflected that State's willingness to participate in establishing the court, yet it should not be inferred that that State had given its consent in advance for the court to exercise its jurisdiction. Indeed, the State where the crime had been committed would, in each case, have to give its specific consent. Over and above those differences in interpretation, those members were agreed that the criterion of territoriality should play an essential role in the conferment of jurisdiction on the court.

125. On the other hand, those members profoundly disagreed with the solution advocated in paragraph 2. In their view, the paragraph seemed to challenge the territorial element established in paragraph 1 and it would run counter to the very aim of establishing an international criminal court, since many States might refuse to confer jurisdiction on the court. Too many States would be required to confer jurisdiction and they would be in a position to try the accused themselves, instead of handing him over to the international criminal court, and in view of the natural tendency of States not to relinquish their jurisdiction, the court's jurisdiction would be considerably diminished.

126. Other members did not agree with the overall approach suggested by the Special Rapporteur in paragraphs 1 and 2 of his possible draft provision and regarded it as inconsistent with the concept underlying the establishment of an international criminal court of justice. Those members pointed out that virtually all crimes against the peace and security of mankind were generally committed by States but were directed against other States, even against mankind at large. In respect of that category of crimes, which were crimes under international law, the question of jurisdiction was of concern not only to individual States but to the international community as a whole. With his approach, the Special Rapporteur seemed to have decided to drop the concept of a crime under international law. If those crimes were not crimes under international law, the question of the establishment of an international criminal court lost its importance. The solution suggested by the

Special Rapporteur would even imply a return to the state of things before instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide were adopted. Those members were in favour of an international criminal court with jurisdiction over all crimes under the Code. There seemed to be no reason to grant privileged status to the State in whose territory the crime had been committed, since it was the whole of the international community that was affected. Neither the consent of the latter State nor of the State of which the perpetrator was a national nor of the victim State nor of the State whose nationals had been victims of the crime should be needed for the international community, acting through the court, to try the perpetrator of a crime against the peace and security of mankind. In the opinion of those members, the question of the conferment of jurisdiction should be solved in accordance with the general principles of international law. States acceding to the statute of the court should at the same time accept the court's jurisdiction to try their nationals.

(iv) Other aspects concerning jurisdiction

127. A number of members endorsed paragraph 3 of the Special Rapporteur's possible draft provision, a paragraph whereby the court would have cognizance of any challenge to its own jurisdiction. It was said in that regard that the paragraph was logical and followed the general practice in authorizing the court to decide whether it had jurisdiction in a given case. Since it would be regarded as the highest international criminal court, there would be no possibility of appealing its decision.

128. With reference to paragraph 4 of the draft provision, on disputes concerning judicial competence and on applications for review of sentences, a number of members expressed agreement with the solution put forward by the Special Rapporteur. One member, in particular, said that the paragraph was necessary for a judicial body of the kind envisaged. If two or more States each claimed the sole right to confer jurisdiction under the criteria set out in paragraphs 1 and 2, the court should be in a position to rule on such disputes. Another member pointed out that the solution proposed in the paragraph would facilitate standardization of judicial practice in the event of a conflict of laws and jurisdiction and the observance of the *non bis in idem* principle in the event of prosecution for one and the same crime before courts in two or more States.

129. Other members expressed reservations about the paragraph. One member wondered what rules or criteria the court could invoke in adjudicating disputes between States on judicial competence or reviewing sentences handed down by courts in different States. The paragraph could run counter to the jurisprudence of the Permanent Court of International Justice in the Lotus case concerning the exercise of jurisdiction contrary to the non bis in idem principle.

130. Another member took the view that the case covered by the paragraph was not a genuine case of review (re-opening the trial after discovery of a new fact) but rather a case of conflicting judgements by courts in different States. In his opinion, to deal with such a dispute, all the States concerned would have to confer jurisdiction on the international criminal court and the judgement submitted for review would have to be final. In other words, all domestic remedies must have been exhausted. But the question arose whether a State that was not prepared to relinquish its jurisdiction for the trial stage in favour of the international criminal court would agree to submit to the reconsideration by that court of a decision rendered by its highest judicial authority. To his mind, it was understandable that, in the circumstances, those who had elaborated the 1953 draft statute had not deemed it advisable to grant such a power of review to the criminal court they had proposed.

131. Some other members recognized that the court's review jurisdiction, as a higher body, could encourage national courts to show greater respect for the rules of international law and to base their decisions on appropriate reasons. They none the less took the view that the conferment of review jurisdiction upon the court might, as indicated in the previous paragraph, be even more unacceptable for States than attribution to the court of direct jurisdiction.

132. A large number of members supported paragraph 5 of the Special Rapporteur's possible draft provision, a paragraph concerning the court's competence to interpret a provision of international criminal law. It was said in that regard that the paragraph would enable the court to play an important role in harmonizing and unifying international criminal law and clarifying the content of certain concepts and principles, such as the concepts of complicity, conspiracy and attempt, and the principles of nullum crimen sine lege, nulla poena sine lege and non bis in idem.

133. Some members fully supported the paragraph and also made a few suggestions to draft it with greater precision or to develop it. For example, one member observed that the paragraph was silent as to whether the court's interpretation would be binding or optional. He emphasized that a binding interpretation would greatly enhance the role of the court. Other members suggested that the court's competence to interpret should cover only the provisions of the draft Code. Some members suggested that the right to request an interpretation of a provision of international criminal law should be granted not only to States but also to the United Nations General Assembly and Security Council and to specific intergovernmental organizations.

134. One member, in particular, pointing out that the competence to interpret the law seemed, under the paragraph, to relate only to abstract rules, suggested that the court could also be given competence on an advisory basis for specific cases. The court would thus become a tool for international pressure and would help to guide and form international public opinion.

135. Referring to the reactions to his possible draft provision on the jurisdiction of an international criminal court, the Special Rapporteur first pointed out that, having attended the debates of the Sixth Committee the previous year, he was well aware that a number of States were still strongly opposed to the establishment of such a court. Hence, it was to take account of that situation that he had proposed a possible draft provision intended simply to give the Commission food for thought and he had taken care not to focus on his personal opinion or to try to impose his views.

136. On the question of the nature or extent of the court's jurisdiction, the Special Rapporteur, bearing in mind the discussion, said that he favoured a combined solution: exclusive jurisdiction for some crimes, such as genocide, etc., and concurrent jurisdiction with national courts for the other crimes covered by the Code. The Commission should carefully determine the crimes for which the court would have exclusive jurisdiction. On the other hand, he had very strong reservations about review or appeal jurisdiction and was firmly opposed to any form of hierarchical scale in which the court would occupy a higher position than national courts. In his opinion, the only instances in which the international court could have jurisdiction of that kind would be cases in which an act under the Code was defined as an ordinary crime instead of as a crime against the peace and security of mankind, and possibly cases in which the victim State or the State of which the victim was a national had

reason to think that the penalty was obviously disproportionate to the heinous nature of the offence. Such cases might reasonably be imagined where a State tried its own national for a crime committed by him abroad, but they were rare and might be avoided altogether if a system of cooperation was established between the affected States so that they could have accurate and precise knowledge of the facts through access to the files.

137. As to conferment of jurisdiction, the Special Rapporteur did not share the opinion of some members that it was not necessary for all of the crimes defined under international law. In his opinion, that reasoning appeared to be based on a misunderstanding. The definition of a crime was one thing and jurisdiction was another. The fact that a crime was defined in international law did not mean that States were automatically divested of the right to deal with it. A State could easily recognize that a crime was a crime under international law, incorporate it into its internal law and prosecute the perpetrators through its national courts, in conformity with its rules of procedure. In the Special Rapporteur's view, when a crime against the peace and security of mankind was committed, there were always States that were directly concerned - the State in whose territory the crime had been committed, the State against which the crime had been directed or whose nationals had been the victims, or the State of which the perpetrator of the crime was a national. It would be going too far to assert that those States had no right to deal with the crime in question because it was a crime under international law.

138. For that reason, in paragraph 1 of his possible draft provision, he had laid down the principle of the priority jurisdiction of the State in whose territory the crime had been committed. He pointed out in that regard that the principle of universal jurisdiction which writers sometimes preferred but had not really prevailed in practice, gave rise to all kinds of material and practical problems - for gathering evidence, for example - which meant that it could not be taken as the rule or as a fundamental principle. In addition, most of the relevant international conventions - whether on the suppression of illegal acts directed against the safety of civil aviation, of the illegal seizure of aircraft and of terrorism, etc. - placed the State in whose territory the crime had been committed first on the list of the States that had jurisdiction to deal with the crime in question.

139. In his possible draft provision, he had not included the State where the alleged perpetrator was found as one of the States from which conferment of jurisdiction was required, simply because that State, under the terms of article 4, provisionally adopted by the Commission, was required to try the alleged perpetrator or to extradite him.

140. The Special Rapporteur took the view that, like some draft statutes for a court prepared by various learned societies and bodies and authors, it would be useful to establish an order of priority among the States from which conferment of jurisdiction was required. That would help to advance international criminal law as a branch of learning. However, the territorial State should be the State from which conferment of jurisdiction was absolutely necessary if the court was to be able to take cognizance of a criminal case.

(c) The institution of criminal proceedings (submission of cases to the court)

141. In his ninth report, and when introducing Part Two of the report, the Special Rapporteur explained that in the light of the considerations in paragraph 68 above, he had also paid special attention in the report to the question of instituting criminal proceedings for crimes against the peace and security of mankind. According to the article he had proposed, proceedings were to be instituted by States. However, in the case of crimes of aggression or the threat of aggression, criminal proceedings were to be subject to prior determination, by the Security Council, of the existence of such crimes.

142. As to the possibility that the Security Council, the guardian of international peace and security, might itself be competent to institute international criminal proceedings directly, the Special Rapporteur took the view that such an interpretation of the Security Council's role would exceed the powers vested in it by the Charter. Instead, its role was either to take preventive measures to forestall a breach of the peace or to take steps to restore peace. Such measures were political and were not of a judicial nature at all. It was therefore hard to see what basis there would be for the Security Council to have sole jurisdiction in the area of criminal proceedings instituted in respect of the crimes in question.

143. The answer might be different, however, if the question was whether, in some cases, criminal proceedings should not be made subject to the Security Council's prior consent. Some of the crimes covered by the draft Code constituted significant violations of international peace. That was so

particularly in the case of aggression and the threat of aggression. Under Article 39 of the Charter of the United Nations, the Security Council had the power to determine "the existence of any threat to the peace, breach of the peace, or act of aggression". In such circumstances, criminal proceedings could be subject to a determination by the Security Council of the existence of an act of aggression or the threat of aggression. Consequently, if a State attempted to refer a case to the court directly, without the prior consent of the Security Council, the court should refer the complaint to the Security Council for its prior consideration and consent.

144. As to the other offences - war crimes, crimes against humanity and in particular genocide or international traffic in narcotic drugs, the Special Rapporteur took the view that the consent of a United Nations organ was not necessary.

145. In view of those considerations, the Special Rapporteur had emphasized that his possible draft provision was intended simply to provide a basis for discussion, and the debate would be a useful guide to him at a later stage. Hence the draft provision was intended not for referral to the Drafting Committee, 301/ but merely as a test of opinion, in order to obtain a clearer picture of the range of views held by members of the Commission.

(i) Who should have the right to institute proceedings

146. Some members commented on the question of who should have the right to institute criminal proceedings and on the solution envisaged in paragraph 1 of the possible draft provision.

147. Some members thought a distinction should be drawn between instituting proceedings and bringing a case before an international court. As in national legal systems, where there were appropriate organs with competence to commence

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301/ This possible draft provision read as follows:

Criminal proceedings

"1. Criminal proceedings in respect of crimes against the peace and security of mankind shall be instituted by States.

2. However, in the case of the crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes."

criminal proceedings against an individual, there should be an international system whereby specific organs would be competent to institute proceedings for international crimes. In the view of those members, the role of States must be confined to making the court aware of the crimes and the persons thought to have committed them, and calling attention to the possibility of instituting proceedings but the State itself should not institute them. The right to bring charges should be entrusted to a prosecutor's office attached to the court, partly because the preparation of the charge should be accompanied by guarantees of impartiality and objectivity, and it would be dangerous to entrust that task to States, which might be tempted to misuse their power for political ends. One member said that a State could submit a complaint in writing to an authority which was competent for that purpose under the court's statute and which must be an independent and impartial body responsible for investigating the charges and determining whether there were grounds for a prosecution.

148. One member said that the future draft article should clearly state that all States parties to the Code would be entitled to bring cases to the attention of the competent body.

149. Other members thought the same right should be granted to entities other than States, such as non-governmental and intergovernmental organizations, and indeed to individuals. It was argued that in the case of an environmental crime, for instance, it would be far simpler for a non-governmental organization to suggest the initiation of criminal proceedings than for States, which had to tread carefully in their international relations. The same was true of war crimes and serious human rights violations, where non-governmental humanitarian organizations could act more easily.

150. One member, in particular, emphasized that crimes against the peace and security of mankind could not be committed by individuals alone, without the help or consent of a State; it would be appropriate to allow not only States but also the General Assembly, the Security Council (without the power of veto) and national liberation movements recognized by the United Nations to refer cases to the competent organs with a view to the institution of criminal proceedings.

151. Another member pointed out that there were two aspects to criminal proceedings: a public right of action and an action for compensation. In his view, the latter was absolutely essential in securing the sentencing of the

guilty person to payment of compensation or to the restoration of stolen property, by virtue of the legal principle inherited from Roman law whereby a court could not render judgement extra petita or non petita except where its decision took the form of a patrimonial penalty, in which case the beneficiary could not, in principle, be a private person. It therefore seemed necessary to make separate provision for an action for compensation.

152. Referring to observations made during the debate by various members on the right to bring proceedings and who should have that right, the Special Rapporteur added that the draft provision he had proposed was only a working hypothesis. With regard to the term "criminal proceedings", which could be taken to mean both the right to lodge a complaint and the right of the competent authorities of the State to bring a prosecution, the Special Rapporteur explained that he construed it only in the sense of the right to take action as a party before the international criminal court, or to file a complaint before it. That was not the same, to his mind, as an actio popularis. Like other members of the Commission, he also believed that the right to institute proceedings in the international criminal court should lie not only with States (to the exclusion of individuals) but also with the international organizations concerned.

(ii) The respective roles of an international criminal court and of the Security Council in the case of crimes of aggression or the threat of aggression

153. Many members of the Commmission referred to the possible relationship between the United Nations Security Council and an international criminal court in respect of crimes of aggression and the threat of aggression, a point covered in paragraph 2 of the proposed draft provision.

154. Several members opposed the idea of making the institution of criminal proceedings contingent on a prior determination by the Security Council of an act or threat of aggression. In the view of those members, granting the Council the possibility of blocking criminal proceedings might create a basic inequality between persons accused of the crime of aggression, and that would be contrary to the principle of all being equal before the criminal law. Those members could agree that the court should be bound by a decision of the Security Council determining that there was an act or a threat of aggression. But the opposite proposition was not certain. It might well happen that the Security Council would not judge a given act to be an act of aggression, even

when the criteria for the crime of aggression were met. Such cases might even occur frequently, if only because of the right of veto. It would be shocking if, because a State had the right of veto, its leaders, or those of a State which it protected, were to be treated differently from the leaders of another smaller, or more isolated, State. The practice of applying a double standard was certainly reprehensible in all cases, but it was understandable from the political standpoint; it was not understandable from a legal standpoint, and even less so from a judicial standpoint. Those members emphasized that the two organs must operate on completely different levels. The Security Council was an organ vested under the Charter with special political powers and prerogatives which could not be usurped by any other organ, whereas the court would be a judicial organ with judicial powers.

155. In support of the same view, one member in particular summarized the possible relationship between the Security Council and the Court in the following manner. Clearly, if the Security Council decided that a particular act committed by a State constituted aggression or a threat of aggression, the international criminal court could not reach a different determination without prejudicing the United Nations system. On the other hand, if the Security Council did not rule on an act of a State, the international criminal court would have full freedom to determine the existence of an act of aggression or a threat of aggression, where appropriate. Lastly, if for one reason or another, the Security Council was to make a determination on that act after the international criminal court had done so - a highly improbable case, since action by the Security Council would have had to become less urgent - it would not consider itself to be bound by the decision of the court. In any event, the point was that the action of the international criminal court and that of the Security Council took place at different levels: the court's role was to punish a criminal act, whereas the Security Council's was to take measures to solve problems and avert threats to peace and international security.

156. In support of their view, the same members invoked the principle applied by the International Court of Justice in its 1986 decision in the case between Nicaragua and the United States. The Court had certainly not refused to consider the question whether one of the States parties to the dispute had been guilty of an act of aggression which had not been determined by the Security Council.

157. Some members stressed that a strict separation between the juridical functions of an international criminal court and the political functions of the Security Council was all the more important because the system lacked a set of checks and balances or a mechanism to determine whether a political body was acting ultra vires. International law divorced from international justice could not be the expression of an ideal. An independent judicial function would enhance the effectiveness of the Charter system and complement it in such a way that the system would not be seen as embodying a dichotomy between law and justice. One member, in particular, stressed that no more consequences than were strictly necessary should be drawn from the role of the Security Council during the recent crisis in the Persian Gulf. It could only be a matter of speculation whether, in the future, developments would warrant a repetition of the rare unanimity displayed by the Security Council in that instance or whether that was an isolated example dictated by the particular circumstances. One could cite a number of other instances in the recent and not-so-recent past where the Security Council had proved unable to make a determination of a threat or act of aggression and where it could be validly argued that such a threat or act had occurred and had continued because the right of veto had been exercised on political grounds regardless of the legal merits of the case.

158. Another member observed that it had rightly been said that a distinction had to be drawn between a determination by a political body of an act or threat of aggression and such a determination by an international criminal court. When the Security Council took no decision, the international criminal court could determine the existence of aggression of its own motion. However, in the case of threat of aggression, in other words, where aggression had not actually occurred, it would be inappropriate for the court to express a legal opinion on a matter that was of a highly political nature.

159. Some other members were of the view that, under the Charter of the United Nations, it was always for the Security Council to determine whether an act of aggression or a threat of aggression had been committed. An individual could be tried on the ground of aggression only if a State had been found by the Security Council to have committed aggression. While the court was bound to respect the decision whereby the Security Council determined whether or not there had in fact been an act of aggression, it should be left to the court to

rule on individual responsibility for participation in the crime, regardless of any possible decision by the Security Council in that connection.

160. One member, in particular, argued that the crimes of aggression and threat of aggression were *sui generis* in that, by definition, they existed only if the Security Council characterized certain acts as such. In those circumstances, it was very difficult to see how an international criminal court could find an individual guilty of having committed the crime of aggression or threat of aggression if the Security Council had not acted or if it had found that aggression or threat of aggression had not been committed. He did not fully agree with the comments made concerning the judgment of the International Court of Justice in the case between Nicaragua and the United States of America, in so far as the Court - whether rightly or wrongly, depending on one's view on the admissibility of the claim - had dealt with self-defence, which was very different from aggression. It would not only be strange to have two different determinations by the Security Council and the court, but it would also be detrimental to the international legal order for an international criminal court to find, for example, that a senior official was guilty of the crime of aggression when the Security Council had held that there had been no aggression on the part of the State to which that official belonged. That did not mean that the international criminal court would not be able to deal with cases involving an armed conflict: it would have to do so if it was called upon to try war crimes.

161. One member pointed out that determination of aggression was not simply a political act, but was founded on international law. In that member's view, denial of the legal character of a determination of aggression by the Security Council on the grounds that the Council was a political organ would also lead to denial of the legal nature of many General Assembly resolutions setting forth principles and rules of international law. Furthermore, it should not be forgotten that acts such as genocide, apartheid or aggression were not only crimes but also political acts. He considered that conferment of the function of determining an act of aggression upon a criminal court, albeit an international court, might ultimately lead to the destruction of the existing system for the maintenance of international law and order. For States Members of the United Nations, the Charter represented the supreme source of contemporary international law, and any decision in the matter by a criminal court would be without force if it ran counter to a decision by the

Security Council. At the same time, he understood the concern of those members of the Commission who did not want acts of aggression to remain unpunished in cases where the Security Council, for political reasons, failed to reach a decision. The problem was a difficult one, but in seeking a solution it was more advisable to adjust to new realities in international relations than to ignore or destroy the existing legal order.

162. In the opinion of another member, several arguments put forward by members who opposed the requirement of a prior determination by the Security Council of aggression or threat of aggression had echoes of attitudes to such concepts as separation of powers and a system of checks and balances. Neither of those elements, however, was particularly prominent in the United Nations system, and he was not sure whether that was an argument for or against findings by the court that differed from a determination by the Security Council.

163. Referring to the various observations made by members during the discussion on the key question of the role of the Security Council in the event of a crime of aggression or a threat of aggression, the Special Rapporteur said that he fully understood the strong reactions to which it had given rise. There was, however, nothing wrong in suggesting the intervention of a political organ, and the idea was to be found in a number of drafts submitted in the past. In particular, before the Second World War Mr. V.V. Pella had put foward a draft statute for the establishment of a criminal chamber within the Permanent Court of International Justice. The draft statute had been accepted by the International Association of Penal Law and specified that international criminal proceedings would be instituted by the "Council of the League of Nations", a term later altered to "Security Council". It was true that past actions by the Security Council justified some doubts about it, but, as had been pointed out in the discussion, the Security Council had changed and the stalemate that had affected it for so long had been the result not of an inherent defect, but of the Cold War going on at the time.

164. The Special Rapporteur added that the question of the role of the Security Council had already been considered by the Commission a few years earlier and a number of possible situations had been discussed. First, there was the situation where the Council unequivocally found, for example, that a crime of aggression had been committed, in which case it would be difficult

for an international criminal court to say the opposite, not because it was apparently subordinated to the Security Council, but simply in order to avoid conflicts between the complainant State and the State against which the complaint was directed. There was also the possibility of the exercise of the right of veto, but he pointed out that a veto was not a decision: it was a non-decision, a refusal, as it were, to deal with a problem. It would not prevent the filing of a complaint before the international criminal court and would not be an obstacle to its jurisdiction. It would not therefore cover a major Power which had the right of veto. Lastly, there was the possibility of the Security Council taking no action because it was ultimately a negotiating body. The Council's silence would, similarly, not prevent the international criminal court from dealing with the case.

165. In the view of the Special Rapporteur, it followed that the role of the Security Council in the context of criminal proceedings could give rise to problems only in the first of those hypothetical cases. He was convinced, however, that the Commission would be able to find wise and well thought-out solutions to those problems that took account of the new political climate.

2. Decisions taken by the Commission in relation to the draft articles

166. At its 2236th to 2241st meetings, the Commission, after considering the report by the Chairman of the Drafting Committee, provisionally adopted articles 11 (Order of a Government or a superior), 14 (Defences and extenuating circumstances), 19 (Genocide), 20 (Apartheid), 21 (Systematic or mass violations of human rights), 22 (Exceptionally serious war crimes) and 26 (Wilful and severe damage to the environment). The Commission also provisionally adopted a new article 3 (Responsibility and punishment) and divided the larger part of the text of former article 3 into two new articles, namely article 4 (Motives) and article 5 (Responsibility of States).

167. The Commission also renumbered several articles provisionally adopted at earlier sessions: former article 4 (Obligation to try or extradite) became article 6; former article 5 (Non-applicability of statutory limitations) became article 7; former article 6 (Judicial guarantees) became article 8; former article 7 (*Non bis in idem*) became article 9; former article 8 (Non-retroactivity) became article 10; former article 10 (Responsibility of the superior) became article 12; former article 11 (Official position and criminal responsibility) became article 13 (Official position and

responsibility); former article 12 (Aggression) became article 15; former article 13 (Threat of aggression) became article 16; former article 14 (Intervention) became article 17; former article 15 (Colonial domination and other forms of alien domination) became article 18; former article 16 (International terrorism) became article 24; former article 18 (Recruitment, use, financing and training of mercenaries) became article 23; and former article X (Illicit traffic in narcotic drugs) became article 25.

168. Again, in connection with the draft articles relating to crimes that had already been adopted at earlier sessions, the Commission either added an introductory paragraph or slightly recast the articles to cover the question of attributing the crimes to individuals and of punishment. This applies to the following draft articles, in the new numbering: 15 (Aggression); 16 (Threat of aggression); 17 (Intervention); 18 (Colonial domination and other forms of alien domination); 23 (Recruitment, use, financing and training of mercenaries); 24 (International terrorism) and 25 (Illicit traffic in narcotic drugs). It was agreed that, as a result of adding a paragraph or slightly recasting the text, purely editing changes would be made in the commentaries to these articles.

169. In addition, the Commission made the following changes in the text of draft articles provisionally adopted at earlier sessions: in the footnote to the title of article 6 (Obligation to try or extradite) (former art. 4), the word "*juridiction*", in the French version, was replaced by "*tribunal*"; the same change was made in the footnote to paragraph 1 of article 9 (*Non bis in idem*) (former art. 7) and the word "*juridiction*" was replaced by the word "*tribunal*"; in the chapeau of paragraph 4 of article 15 (Aggression) (former art. 12), the words "In particular", appearing in square brackets, were removed.

170. With regard to structure, the Commission decided to divide the Code into two parts. Part I consists of two chapters, chapter 1 entitled "Definition and characterization" (arts. 1 and 2), and chapter 2 entitled "General principles" (arts. 3 to 14). Part II is entitled "Crimes against the peace and security of mankind" (arts. 15 to 26). It was agreed in the Commission that the order adopted in the draft for presenting the articles relating to crimes did not in any way whatsoever seek to indicate any kind of order of seriousness of the crimes involved.

171. The Commission decided to defer the question of applicable penalties to the second reading of the draft, so as to examine it in the light of the discussion held in the Commission at the present session (see paras. 70 to 105 above) and bearing in mind the comments and observations of Governments on the matter.

172. The Commission also decided that, on second reading of the draft and in the light of the comments and observations of Governments, it would discuss the issue connected with paragraph 3 of draft article 3, namely whether all of the crimes under the draft Code or only a number of them could involve attempt, and in the latter case, what the crimes were.

173. The Commission adopted the draft as a whole on first reading at its 2241st meeting, on 12 July 1991. In doing so, the Commission is none the less mindful that the draft Code is still open to some improvements, which can be made on second reading, with the benefit of further points made in the comments and observations by Governments. The draft is reproduced below, in Section D.1 of this chapter.

174. Also at the 2241st meeting, the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles set out in Section D.1 of this chapter, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations should be submitted to the Secretary-General by 1 January 1993.

175. The draft that the Commission has completed on the first reading at the present session constitutes the first part of the Commission's work on the topic of the draft Code of Crimes against the Peace and Security of Mankind. Naturally, the Commission will continue at forthcoming sessions to fulfil the mandate the General Assembly assigned to it in paragraph 3 of resolution 45/41, of 28 November 1990, which invites the Commission, in its work on the draft Code of Crimes against the Peace and Security of Mankind to consider further and analyse the issues raised in its report concerning the question of an international jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. The Commission has already started to discharge this mandate and its work on the topic at the present session is reflected in paragraphs 106 to 165 above.

C. Tribute to the Special Rapporteur, Mr. Doudou Thiam

176. At its 2241st meeting, on 12 July 1991, the Commission, after provisionally adopting the draft Code of Crimes against the Peace and Security of Mankind, adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> "*Having adopted* provisionally the draft Code of Crimes against the Peace and Security of Mankind,
>
> "*Wishes to express* to the Special Rapporteur, Mr. Doudou Thiam, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his untiring dedication and his professional abilities, which have enabled the Commission to bring to a successful conclusion its first reading of the draft Code of Crimes against the Peace and Security of Mankind".

D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind

1. Text of the draft articles provisionally adopted by the Commission on first reading

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

PART I

CHAPTER 1. DEFINITION AND CHARACTERIZATION

Article 1 [302]

Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2 [303]

Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

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[302] For the commentary, see *Yearbook ... 1987*, vol. II (Part Two), p. 13.

[303] For the commentary, see *ibid*., p. 14.

CHAPTER 2. GENERAL PRINCIPLES

Article 3 [304]

Responsibility and punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. ...] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

Article 4 [305]

Motives

Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

Article 5 [306]

Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

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[304] For the commentary, see sect. D.2 below.

[305] For the commentary, see *ibid*.

[306] For the commentary, see *ibid*.

Article 6* 307/

Obligation to try or extradite

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court.

Article 7 308/

Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

Article 8 309/

Judicial guarantees

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular, he shall have the right to be presumed innocent until proved guilty and have the rights:

(a) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(b) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

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* This article will be reviewed if an international criminal court is established.

307/ For the commentary, see *Yearbook ... 1988*, vol. II (Part Two), p. 67.

308/ For the commentary, see *Yearbook ... 1987*, vol. II (Part Two), p. 15.

309/ For the commentary, see *ibid*., p. 16.

(c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt.

Article 9 310/

Non bis in idem

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court*.

2. Subject to paragraphs 3, 4 and 5, no one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by an international criminal court or by a national court for a crime under this Code if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code*.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

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* The reference to an international criminal court does not prejudge the question of the establishment of such a court.

310/ For the commentary, see Yearbook ... 1988, vol. II (Part Two), p. 68.

(a) if the act which was the subject of the previous judgement took place in the territory of that State; or

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

Article 10 311/

Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

Article 11 312/

Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

Article 12 313/

Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

311/ For the commentary, see ibid., p. 69.

312/ For the commentary, see sect. D.2 below.

313/ For the commentary, see *Yearbook ... 1988*, vol. II (Part Two), p. 70.

Article 13 314/

Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Governmment, does not relieve him of criminal responsibility.

Article 14 315/

Defences and extenuating circumstances

1. The competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime.

2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

PART II

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 15 316/

Aggression

1. An individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to ...].

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

314/ For the commentary, see ibid., p. 71.

315/ For the commentary, see sect. D.2 below.

316/ For the commentary, see Yearbook ... 1988, vol. II (Part Two), p. 71.

4. Any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these

peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 16 [317]

Threat of aggression

1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to ...].

2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

Article 17 [318]

Intervention

1. An individual who as leader or organizer commits or orders the commission of an act of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to ...].

2. Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

3. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 18 [319]

Colonial domination and other forms of alien domination

An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to ...].

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[317] For the commentary, see Official Records of the General Assembly, Forty-fourth session, Supplement No. 10 (A/44/10), p. 180.

[318] For the commentary, see ibid., p. 183.

[319] For the commentary, see ibid., p. 186.

Article 19 320/

Genocide

1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced [to ...].

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Article 20 321/

Apartheid

1. An individual who as leader or organizer commits or orders the commission of the crime of apartheid shall, on conviction thereof, be sentenced [to ...].

2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

(a) denial to a member or members of a racial group of the right to life and liberty of person;

(b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

320/ For the commentary, see sect. D.2 below.

321/ For the commentary, see ibid.

(d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

(e) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

Article 21 322/

Systematic or mass violations of human rights

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
- deportation of forcible transfer of population shall, on conviction thereof, be sentenced [to ...].

Article 22 323/

Exceptionally serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

322/ For the commentary, see *ibid.*

323/ For the commentary, see *ibid.*

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value.

Article 23 324/

Recruitment, use, financing and training of mercenaries

1. An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

- recruitment, use, financing or training of mercenaries for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law shall, on conviction thereof, be sentenced [to ...].

2. A mercenary is any individual who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

324/ For the commentary, see Official Records of the General Assembly, Forty-fifth session, Supplement No. 10 (A/45/10), p. 64.

(d) is not a member of the armed forces of a party to the conflict; and

(e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any individual who, in any other situation:

(a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) is neither a national nor a resident of the State against which such an act is directed;

(d) has not been sent by a State on official duty; and

(e) is not a member of the armed forces of the State in whose territory the act is undertaken.

Article 24 325/

International terrorism

An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

- undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public shall, on conviction thereof, be sentenced [to ...].

325/ For the commentary, see ibid., p. 62.

Article 25 326/

Illicit traffic in narcotic drugs

1. An individual who commits or orders the commission of any of the following acts:

- undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

Article 26 327/

Wilful and severe damage to the environment

An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to ...].

2. Text of draft articles 3, 4, 5, 11, 14, 19, 20, 21, 22 and 26, with commentaries thereto and commentary to Part II as a whole, as provisionally adopted by the Commission at its forty-third session

PART I

...

CHAPTER 2. GENERAL PRINCIPLES

Article 3

Responsibility and punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

326/ For the commentary, see ibid., p. 67.

327/ For the commentary, see sect. D.2 below.

> 2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.
>
> 3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. ...] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

Commentary

(1) This article deals with individual criminal responsibility, criminal participation and attempt.

(2) Paragraph 1 deals specifically with the responsibility of the perpetrator of the crime and limits criminal responsibility and the resulting punishment to individuals, to the exclusion of States. It is true that the act for which an individual is responsible might also be attributable to a State if the individual acted as an "agent of the State", "on behalf of the State", "in the name of the State" or as a de facto agent, without any legal power. Draft article 3 clearly establishes the criminal responsibility of the individual and is without prejudice to the international responsibility of the State. In this connection and during the discussion of the draft Code in plenary, some members of the Commission supported the proposition that not only an individual but also a State could be held criminally responsible. At its thirty-sixth session, the Commission nevertheless decided that the draft Code should be limited at the current stage to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. 328/ It should be pointed out that, assuming that the criminal responsibility of the State can be codified, the rules applicable to it cannot be the same as regards investigation, appearance in court and punishment. The two regimes of criminal responsibility would be different. During the adoption of the commentary to article 19 of the draft articles on State responsibility, the

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328/ Yearbook ... 1984, vol. II (Part Two), p. 17, document A/39/10, para. 65 (a).

Commission already warned against the tendency to derive from the expression "international crime", used in that article, a criminal content as understood in criminal law. It sounded a warning against "any confusion between the expression 'international crime' as used in this article and similar expressions, such as 'crime under international law', 'war crime', 'crime against peace' and 'crime against humanity', etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes, for which those instruments require States to punish the guilty persons adequately, in accordance with the rules of their internal law". 329/ It emphasized that "the obligation to punish personally individuals who are organs of the State and are guilty of crimes against the peace, against humanity, and so on does not, in the Commission's view, constitute a form of international responsibility of the State ...". 330/

(3) Paragraph 2 relates to complicity, which it defines as aiding, abetting or providing the means for the commission of a crime against the peace and security of mankind. Complicity, as a form of participation in the crime, was already provided for by Principle VII of the Nürnberg Principles, by article 2, paragraph 13 (iii), of the 1954 draft Code and by article III (e) of the 1948 Genocide Convention. Most members agreed that any aiding, abetting or means provided prior to the perpetration of the crime or during its commission constituted obvious cases of complicity. On the other hand, opinions were divided on how to deal with aiding, abetting or means provided ex post facto, in other words, after the commission of the crime, for example, when the perpetrator was helped to get away or to eliminate the instruments or the proceeds of the crime, and so on. A conclusion seemed to be reached that complicity should be regarded as aiding, abetting or means provided ex post facto, if they had been agreed on prior to the perpetration of the crime. However, opinions were divided as to aiding, abetting or means provided ex post facto without any prior agreement. In the view of some members who represented certain legal systems, that was also complicity and

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329/ Yearbook ... 1976, vol. II (Part Two), p. 119, document A/31/10, paragraph (59) of the commentary to article 19.

330/ Ibid., p. 104, paragraph (21).

the accomplice would be known under those legal systems as "an accessory after the fact". For other members, that was an offence of a different kind, known as "harbouring a criminal". They did not see how, for example, a person who gave shelter to the perpetrator of genocide could be compared to that perpetrator as a participant in a crime against the peace and security of mankind. That person did, of course, commit a crime, but he did not take part in the perpetration of a crime against the peace and security of mankind.

(4) Paragraph 2 also refers to conspiracy to commit a crime against the peace and security of mankind and to incitement to do so as possible forms of participation which entail the criminal responsibility of an individual and make him liable to punishment. Instead of the French term "complot", the Commission preferred the term "entente", which was taken from article III of the Genocide Convention and differed, in French at least, from the term used in the 1954 draft Code and in Principle VI of the Nürnberg Principles. "Entente" and "complot" were both translations of the word "conspiracy", which was used in the English version of the draft article. In any event, the punishable conduct in question was participation in a common plan for the commission of a crime against the peace and security of mankind. The Commission used that concept to mean a form of participation, not a separate offence or crime. Direct incitement had already been used in the 1954 draft Code, while the Genocide Convention referred to direct and public incitement. The Commission considered that incitement did not have to be public in order to be punishable, provided that it was intended to encourage the perpetration of certain crimes.

(5) Both the 1954 draft Code (art. 2, para. 13 (iv)) and the Genocide Convention (art. III (d)) make attempt a punishable act, but without defining it. Paragraph 3 of draft article 3 deals with the responsibility and punishment of any individual who commits an act constituting an attempt and gives a definition of attempt. The definition makes it clear that the concept of attempt includes the following elements: (a) intent to commit a particular crime; (b) an act designed to commit it; (c) an apparent possibility of committing it; and (d) non-completion of the crime for reasons independent of the perpetrator's will. Whereas the 1954 draft Code referred to attempts to commit "any" of the crimes dealt with therein, in this case, opinions in the Commission were divided on whether attempt was admissible in the case of all the crimes covered by the present draft Code. Some members considered that it

was. Other members were of the view that a detailed article-by-article analysis would have to be made in order to determine whether the characterization of attempt was applicable to each crime taken individually. During the first reading of the draft articles, the Commission did not want to choose between the two solutions. This is why the first part of the paragraph contains the words "as set out in articles ..." in square brackets. The Commission will take a decision on this question during the second reading of the draft articles and in the light of the comments by governments.

(6) The word "sanction" in the French title of this article has been used as the equivalent of the word "punishment" in the English title.

Article 4

Motives

> Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

Commentary

This article deals with the irrelevance of motives not related to the definition of the offence and claimed by the accused to relieve him of his responsibility. The Commission considered this provision necessary to show that the offender cannot resort to any subterfuge. He cannot invoke any motive as an excuse if the offence has the characteristics defined in the Code. The purpose is to exclude any defence based on another motive, when the real motive of the act is within the definition of the crimes covered by the draft Code. The word "motive" means the impulse which led the perpetrator to act or the feeling which animated him (racism, religious feeling, political opinion, etc.). No motive of any kind can justify a crime against the peace and security of mankind. The motive answers the question what were the reasons animating a perpetrator. Motives generally characterizing a crime against humanity are based on racial or national hatred, religion or political opinion. By reason of their motives, therefore, the crimes to which the draft Code relates are the most serious crimes. Motive must be distinguished from intent, i.e. the deliberate will to commit the crime, which is a necessary condition for the offences covered by the draft Code and was discussed in paragraph (3) of the commentary to article 1 of the draft.

Article 5

Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

Commentary

(1) As stated in the commentary to article 3, the draft Code, in paragraph 1 of article 3, limits criminal responsibility for a crime against the peace and security of mankind to the individual and the Commission decided, at least at this stage, not to apply international criminal responsibility to States. However, it was also pointed out in the commentary to article 3 that an individual could commit a crime against the peace and security of mankind not only as an individual, but also and most frequently as an "agent of the State", "on behalf of the State", "in the name of the State" or even in a simple de facto relationship, without being vested with any legal power.

(2) Accordingly, this draft article leaves intact the international responsibility of the State, in the traditional sense of that expression as it derives from general international law, for acts or omissions attributable to the State by reason of offences of which individuals acting as agents of the State are accused. As the Commission already emphasized in the commentary to article 19 of the draft articles on State responsibility, the punishment of individuals who are organs of the State "certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs". 331/ The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime. It could be obliged to make reparation for injury caused by its agents.

331/ Ibid.

Article 11

Order of a Government or a superior

> The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

Commentary

(1) The question of the role which can be played by a superior in the commission of a crime against the peace and security of mankind may be considered from two points of view. The first aspect of the question is the extent to which the commission of a crime by a subordinate also entails the responsibility of his superior. This aspect is dealt with in article 12 below. The second aspect of the question is to determine to what extent an order given by a superior for the commission of a crime against the peace and security of mankind may relieve the subordinate of responsibility. This is the question dealt with in article 11.

(2) The rule that an order of a superior does not, in principle, relieve a subordinate of responsibility was established by the decisions of the military tribunals after the Second World War and it was stated in Principle IV of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in article 4 of the 1954 draft Code. For example, in the case of Field Marshal List and others, the United States military tribunal stated that "An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, a field marshal of the German Army with more than 40 years of experience as a professional knew or ought to have known of its criminal nature". ... "We are of the view ... that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected." [332]

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[332] American Military Tribunals, case No. 7, vol. XI, pp. 1271 and 1236.

(3) It is nevertheless recognized that, if a superior order is also to entail the responsibility of the subordinate, he must have had a choice in the matter and a genuine possibility of not carrying out the order. Such circumstances would not exist in cases of irresistible moral or physical coercion, state of necessity and obvious and acceptable error. Case law has, however, been very harsh in its treatment of such defences. This is why Principle IV of the Nürnberg Principles states that an order does not relieve a person of responsibility "provided a moral choice was in fact possible to him". The 1954 draft Code uses more precise wording to state that an order does not relieve a subordinate of responsibility "if, in the circumstances at the time, it was possible for him not to comply with that order".

(4) It is thus clear that the question of superior order and its effect on the responsibility of a subordinate is linked to the theory of defences or exceptions to the principle of responsibility which the Commission deals with, still on a provisional basis, in draft article 14, as explained in the commentary to that draft article. It might therefore be asked why the Commission did not deal with that question in article 14, which relates to defences and extenuating circumstances. The Commission is of the view that the importance of the question and its relationship with the issue of responsibility of the superior dealt with in article 12 justify covering it in article 11 rather than in article 14.

Article 14

Defences and extenuating circumstances

1. The competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime.

2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

Commentary

(1) This article provisionally combines two criminal law concepts, namely, defences and extenuating circumstances, which come into play in determining the responsibility of the perpetrator of a crime against the peace and security of mankind or a participant in its perpetration and the punishment applicable to them. The Commission regards these as very important concepts and it discussed them at the current session. It was, however, not in a

position to draft very detailed provisions on which all members could agree, since their opinions differed on the effects or consequences deriving from these concepts. It therefore decided that, at this stage, it should confine itself to the adoption of this general provision, which refers to the possibility that the court may take account of the existence of defences and extenuating circumstances. More specific and more suitable wording will be discussed at a later stage, taking account of the comments of Governments, which will enable the Commission to draft more appropriate provisions during the second reading of the draft articles.

(2) With regard to paragraph 1 on defences, an exchange of ideas was held on the applicability to the crimes covered by the draft Code of some traditional criminal law concepts, such as self-defence, coercion, state of necessity, force majeure and error. In referring to self-defence, for example, some members expressed the view that the nature of some crimes covered by the Code did not admit of defences. In reply to some members who could accept self-defence only in the event of aggression, other members stated that, if aggression was determined to have taken place, it could not be justified by any fact. Further exchanges of views took place on coercion, state of necessity, force majeure, error and other possible defences, such as mental incapacity. 333/ The Commission decided that there should be a separate provision (draft art. 11) on superior order for the reasons explained in the commentary to that draft article. In the opinion of some members, defences could never be invoked in connection with certain categories of crimes, such as crimes against humanity.

(3) Referring to paragraph 2, several members pointed out that a provision of that kind should be much more precise in listing the circumstances which would allow for adjustability of the penalty. 334/ Several members also expressed

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333/ These concepts were discussed at the Commission's thirty-ninth session during the consideration of the Special Rapporteur's fifth report, see Report of the International Law Commission on the work of its thirty-ninth session, document A/42/10, paragraphs 44 to 55.

334/ On this question, see the discussion of applicable penalties in plenary at the present session in paragraph 91 above.

reservations as to whether two basically different concepts should be included in the same article: defences related to the existence or non-existence of responsibility, whereas extenuating circumstances presupposed responsibility and became relevant only in determining the penalty. For the purpose referred to in paragraph (1) of this commentary, however, the Commission decided to retain the draft article in its entirety.

PART II. CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

(1) Part II defines the scope *ratione materiae* and *ratione personae* of the draft Code.

(2) The draft no longer maintains a distinction between crimes against peace, war crimes, and crimes against humanity. That distinction has provided useful guidelines in determining the approach to be taken in relation to each crime but the Commission felt that, at this stage and pending the receipt of the comments of Governments, it could be dispensed with inasmuch as solutions have emerged as regards both the constituent elements and the attribution of each crime.

(3) The order in which the crimes have been listed does not imply any value judgement as to the degree of seriousness of those crimes.

(4) The Commission has adopted a standard format for identifying the persons to whom responsibility for each of the crimes listed in the Code could be ascribed. It has worked out three types of solutions, depending on the nature of the crimes concerned. In its view, some of the crimes defined in the Code, namely aggression (art. 15), threat of aggression (art. 16), intervention (art. 17), colonial domination (art. 18), and apartheid (art. 20) are always committed by, or on orders from, individuals occupying the highest decision-making positions in the political or military apparatus of the State or in its financial or economic life. For those crimes, the Commission has restricted the circle of potential perpetrators to leaders and organizers, a phrase which is found in the Charter of the Nürnberg Tribunal and in the Charter of the Tokyo Tribunal. A second group of crimes, namely the recruitment, use, financing and training of mercenaries (art. 23) and international terrorism (art. 24), would come under the Code whenever agents or representatives of a State are involved therein. A third group of crimes, i.e. genocide (art. 19), systematic or mass violations of human rights (art. 21), exceptionally serious war crimes (art. 22), illicit

traffic in narcotic drugs (art. 25) and wilful and severe damage to the environment (art. 26), would be punishable under the Code by whomever they are committed.

(5) The articles do not require that the persons identified should have themselves perpetrated the act concerned; it makes them liable for the mere ordering of such an act.

(6) The provisions on perpetrators must be read in conjunction with article 3 on complicity, conspiracy and attempt.

(7) The Commission dealt in a standard manner with the question of penalties. The debate in the Commission revealed different trends in this respect. Some members held the view that the matter should not be dealt with in the Code and ought to be left to domestic law. Others recalled that the absence of any provision in this respect in the 1954 draft Code had been viewed by many as one of the draft's major flaws; they therefore insisted that the question of penalties be addressed. Among them some advocated the inclusion of a scale of penalties that would be applicable to all crimes, while others favoured accompanying the definition of each crime with an indication of the corresponding penalty. The Commission has not attempted at this stage to reconcile these divergent views. It has merely signalled the problem by including in each article, between square brackets, the word "to" followed by a blank space. In this way, all positions are safeguarded and the Commission will, on second reading, be able to address the issue (including the question of the penalties to be applied for complicity, conspiracy and attempt), in full knowledge of the various possible approaches. 335/

335/ For the commentary to article 15, see *Yearbook ... 1988*, vol. II, Part Two, Chap. IV, sect. C.2; for the commentaries to articles 16, 17 and 18, see the Report of the Commission on the work of its forty-first session (*Official Records of the General Assembly, Forty-fourth session, Supplement No. 10* (A/44/10)), chap. III, sect. C.2; for the commentaries to articles 23, 24 and 25, see the Report of the Commission on the work of its forty-second session (Ibid., *Forty-fifth session, Supplement No. 10* (A/45/10)), chap. II, sect. D.2.

Article 19

Genocide

1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced [to ...].

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Commentary

(1) The extreme gravity of the crime of genocide and the fact that the General Assembly had drafted an international convention on its prevention and punishment as early as 1948 made it essential to include this crime in the draft Code and also facilitated the Commission's task. The definition of the crime of genocide contained in this draft article is thus based entirely on that embodied in article II of the Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the General Assembly on 9 December 1948, and has been widely accepted by the international community and ratified by the overwhelming majority of States.

(2) Whereas article 2, paragraph (10), of the 1954 draft Code contained the word "including", which made the list of acts constituting genocide non-exhaustive rather than exhaustive, the Commission decided to use the wording of article II of the Convention, which makes the list of acts exhaustive in nature. The Commission decided in favour of that solution because the draft Code is a criminal Code and in view of the *nullum crimen sine lege* principle and the need not to stray too far from a text widely accepted by the international community.

(3) The crime is composed of two elements:

(a) The commission of one or more of the acts listed in the draft article;

(b) Intent to destroy, in whole or in part, one of the groups protected by the draft article.

(4) As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the Ad Hoc Committee on Genocide contained provisions on "cultural genocide" covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of "cultural genocide" contained in the two drafts and simply listed acts which come within the category of "physical" or "biological" genocide. The first three subparagraphs of the draft article list acts of "physical genocide", while the last two list acts of "biological genocide".

(5) It was suggested that deportation be included in subparagraph (c) of paragraph 2. The Commission however felt that this subparagraph covered deportation when carried out with the intent to destroy the group in whole or in part.

(6) The draft article clearly shows that it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the draft article with the clear intention of bringing about the total or partial destruction of a protected group.

(7) Although they are not covered by the definition of genocide, some of the acts listed in paragraph (4) of this commentary might, if they are committed

in a systematic manner or on a mass scale, constitute the crime dealt with in article 21 of the draft Code, which relates to "systematic or mass violations of human rights".

(8) One member of the Commission was of the opinion that the forcible transfer referred to in paragraph 2 (e) of draft article 19 should not be limited only to children, but should also apply to adults.

Article 20

Apartheid

1. An individual who as leader or organizer commits or orders the commission of the crime of apartheid shall, on conviction thereof, be sentenced [to ...].

2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

(a) denial to a member or members of a racial group of the right to life and liberty of person;

(b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

(d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

(e) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

Commentary

(1) Apartheid, an institutionalized form of racial discrimination which aims to perpetuate domination of a racial group and oppress it, is nowadays so deeply condemned by the world's conscience that it was inconceivable for the Commission to exclude it from a code which punishes the most abominable crimes

that jeopardize the peace and security of mankind. It should be remembered in this connection that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly in resolution 2391 (XXIII) of 26 November 1968, already ranked "inhuman acts resulting from the policy of *apartheid*" as crimes against humanity and, therefore, no statutory limitation applied to them.

(2) The definition of the crime of apartheid contained in this draft article is based, both in letter and in spirit, on article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly in resolution 3068 (XXVIII) of 13 November 1973. The Commission none the less considered that it was more in the nature of a provision of criminal law not to incorporate examples in the body of the provision itself and to confine the definition to a description of the courses of conduct constituting a crime. The examples have therefore been removed from the definition simply for technical reasons, without in any way diminishing the possibility of them being considered as crimes or the possibility that a court might regard other examples as meeting all the characteristics of one of the courses of conduct prohibited by the draft article.

(3) The Commission has restricted the scope *rationae personae* of the draft article to leaders or organizers - an approach it has also adopted in relation to other crimes such as aggression and intervention. It has thereby sought to make criminally liable only those who are in a position to use the State apparatus for the planning, organization or perpetration of the crime.

(4) The Commission did not want to limit the scope of the definition in the draft article by references to southern Africa, as in the case of article II of the 1973 Convention, which contains such a reference. Irrespective of whether such practices might one day disappear altogether from that region of the world, the Commission also took the view that such a universally condemned crime as apartheid should be defined so that the definition is applicable without any restriction as to time or place.

(5) As regards the phrase "racial group or groups" which is repeatedly used in the definition of the crime contained in the 1973 Convention, the Commission has felt that the reference to "a racial group" was sufficient to cover several groups and has therefore deleted the words "or groups".

Article 21

Systematic or mass violations of human rights

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds

in a systematic manner or on a mass scale; or

- deportation or forcible transfer of population

shall, on conviction thereof, be sentenced [to ...].

Commentary

(1) Article 2, paragraph (11), of the 1954 draft Code included among offences against the peace and security of mankind "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities". In reconsidering this provision, which was not exhaustive in the 1954 draft Code, the Commission deemed it necessary, while keeping the bulk of the crimes it included, to update it in form and in substance and to take account of developments in international law in recent decades.

(2) To begin with, the Commission noted that the common factor in all the acts constituting crimes under this draft article was a serious violation of certain fundamental human rights. In the light of this idea and bearing in mind the considerable development in the protection of human rights since the 1954 draft Code, both in the elaboration of international instruments and in the bodies that implement them and in the universal awareness of the pressing need to protect such rights, the Commission thought it useful to bring out this common factor in the draft article itself and in the title.

(3) Again, since the acts covered by the draft Code must be of an extremely serious character, under the Commission's draft article only systematic or mass violations of human rights would be a crime. The systematic element relates to a constant practice or to a methodical plan to carry out such violations. The mass-scale element relates to the number of people affected by such violations or the entity that has been affected. Either one of these aspects - systematic or mass-scale - in any of the acts enumerated in the draft article is enough for the offence to have taken place. On the other hand, isolated acts of murder or torture, and so on, which are not systematic or on a mass scale, no matter how reprehensible as violations of human rights, do not come under the draft Code. Consequently, each of the subparagraphs concerning the criminal acts should be read in conjuction with the chapeau of the article, under which they are a crime only if they constitute systematic or mass violations of human rights.

(4) Moreover, compared with the 1954 draft Code, the Commission expanded the list of acts by including torture and it emphasized some others, such as deportation or forcible transfer of population. However, bearing in mind the draft Code's criminal character and the principle of _nullum crimen sine lege_, the Commission deemed it necessary to make an exhaustive list of acts, unlike the list contained in the 1954 draft Code.

(5) It is important to point out that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone. Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the crimes covered by the draft article; yet the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code.

(6) In the case of murder, there is no need to expatiate in view of the fact that this crime is covered by all criminal codes of internal law throughout the world. In this regard, it should none the less be pointed out that the Commission did not include in the draft article the concept of extermination, provided for in a parallel provision in the 1954 draft Code. It considered that extermination, where it was not a form of genocide, would constitute a form of mass murder and would thus be covered by the draft article.

(7) The 1954 draft Code did not provide for the crime of torture. The Commission took the view that the particularly odious character of this crime, as well as the numerous examples unfortunately furnished by international realities in recent decades, fully warranted including torture among crimes against the peace and security of mankind when it was a systematic or mass practice. As to the definition, the crime of torture has been the subject of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX) of 9 December 1975), as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the General Assembly in resolution 39/46 on 10 December 1984 and entered into force on 26 June 1987. One member of the Commission agreed with the actual definition of the crime given in the Convention but thought that possible perpetrators of the crime should not be limited solely to public officials or other persons acting in an official capacity. In his opinion, groups of private individuals could also perpetrate this crime.

(8) Another violation of human rights covered by the draft article is establishing and maintaining over persons a status of slavery, servitude or forced labour. In regard to the definition of these crimes, the Commission considered that, since there were specific conventions on these matters it was enough for the draft article to enumerate the crimes and leave it to the commentary to mention the principles of international law underlying these conventions. For example, slavery is defined in the Slavery Convention, of 25 September 1926, and in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956, which also defines servitude. Both slavery and servitude are also prohibited under article 8 of the International Covenant on Civil and Political Rights, of 16 December 1966. The article also prohibits forced labour, a concept which it spells out, and which also forms the subject of some conventions, such as Convention No. 29, adopted by the General Conference of the International Labour Organisation on 28 June 1930, and Convention No. 105 concerning the Abolition of Forced Labour, adopted by the General Conference of the International Labour Organisation on 25 June 1957. It should none the less be pointed out that, unlike some of these conventions and the 1954 draft Code, it is a crime under the present draft article not only to

place persons in or reduce them to a status of slavery, servitude or forced labour but also to maintain them in that status, should they already be in such a situation when the Code enters into force.

(9) Persecution on social, political, racial, religious or cultural grounds, already a crime under the 1954 draft Code, relates to human rights violations other than those covered by the previous paragraphs, committed in a systematic manner or on a mass scale by government officials or by groups that exercise de facto power over a particular territory and seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied. Persecution may take many forms, for example, a prohibition on practising certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national language, even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group. Such acts could come within the scope of this article when committed in a systematic manner or on a mass scale. Some members of the Commission were of the view that, in the absence of a universally acceptable definition of persecution, it was not desirable to include it in the draft Code.

(10) It was pointed out in the Commission that a practice of systematic disappearances of persons was also a phenomenon that deserved to be specifically mentioned in the draft Code.

(11) The subparagraph on deportation or forcible transfer of population is listed separately, because the crime in itself necessarily entails a mass-scale element. The Commission considered that a crime of this nature could be committed not only in time of armed conflict but also in time of peace, which justified including it in the draft article. Deportation, already included in the 1954 draft Code, implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State. It was pointed out in the Commission that the object was in this case essential to the definition of the crime. Transfers of population under the draft article meant transfers intended, for instance, to alter a territory's demographic composition for political, racial, religious or other reasons, or transfers made in an attempt to uproot a people from their ancestral lands. One member of the Commission was of the view that this crime could also come under the heading of genocide.

Article 22

Exceptionally serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value.

Commentary

(1) This draft article is a compromise between one trend in the Commission towards a general definition of war crimes unaccompanied by a detailed list of crimes and an enumeration of the categories of such crimes, and another trend which, without prejudice to a general definition, was in favour of including as detailed a list as possible of all war crimes covered by the article. The Commission therefore opted for a middle-ground solution which, in the chapeau of paragraph 2 sets out a general definition of war crimes covered by the draft Code, a definition followed by an exhaustive enumeration of the categories of war crimes concerned.

(2) It should be emphasized that the war crimes covered by the draft article are not all war crimes in the traditional sense, nor are they all grave

breaches covered by the relevant common articles of the 1949 Geneva Conventions (article 50 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; article 51 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; article 130 of the Convention relative to the Treatment of Prisoners of War and article 147 of the Convention relative to the Protection of Civilian Persons in Time of War) or any of the grave breaches covered by Protocol I Additional to the Geneva Conventions (art. 85). Faithful to the criterion that the draft Code should cover only the most serious among the most serious of crimes, the Commission therefore selected, on the basis of the criterion of exceptional seriousness, violations of international law applicable in armed conflicts that should be crimes under a code of this nature. Hence, the fact that a particular war crime in the traditional sense under humanitarian law or a grave breach within the meaning of the Geneva Conventions or the Additional Protocol is not covered by the present draft article as a crime against the peace and security of mankind in no way affects the fact that they are crimes under international law applicable in armed conflicts: as the beginning of the chapeau of paragraph 2 clearly indicates, the concept of a war crime enunciated in the article applies only for the purposes of the Code.

(3) A war crime, within the meaning of the draft article, necessarily entails: (a) that the act constituting a crime falls within any one of the six categories in paragraph 2 (a) to (f); (b) that the act is a violation of principles and rules of international law applicable in armed conflicts; (c) that the violation is exceptionally serious. It is the combination of these three elements that transforms an act or an omission into a war crime for the purposes of the draft Code.

(4) The expression "violation of principles and rules of international law applicable in armed conflict" is a shorter form of the definition contained in article 2 (b) of Protocol I Additional to the Geneva Conventions. In addition, the words "armed conflict" cover not only international armed conflicts within the meaning of article 1, paragraph 4, of Protocol I Additional to the Geneva Conventions but also non-international armed conflicts covered by article 3 common to the four 1949 Geneva Conventions.

(5) The term "exceptionally serious" violation in the chapeau of paragraph 2 and the six categories identified in subparagraphs (a) to (f) indicate, as

already pointed out above, the specific nature of the war crimes covered by the Code. The seriousness of the violation is marked, to a great extent, by the seriousness of the effects of the violation. The six categories are exhaustive even though it falls to the Court to determine or assess whether some acts or omissions fulfil the character of exceptional seriousness for each category. This also leaves some possibility for progressive development of the international law applicable in armed conflicts. For example, the category concerning the use of unlawful weapons can take account of further prohibitions of certain weapons, prohibitions that might be established in future.

(6) Subparagraph (a) contains details concerning the acts involved, details that relate to the nature of the acts or the way in which they are performed, as well as to the property legally protected under the subparagraph. They are acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons. The word "acts" covers both acts and omissions. For example, the paragraph would certainly cover the omission of failing to supply food to meet a prisoner's needs, if the omission led to the prisoner's death. The word "persons" should be taken in the individual or collective sense. Accordingly, the acts of inhumanity, cruelty or barbarity may be systematically directed against one person or a group of persons. The subparagraph sets out in square brackets a number of examples of acts which unquestionably fall within the general definition in the subparagraph. Some members thought that it was useful to indicate in the main body of the subparagraph a few examples of the acts covered by the subparagraph. The view was expressed that such an insertion was not justified, in view of the non-exhaustive and questionable nature of the examples given.

(7) Under subparagraph (b) it is a crime to establish settlers in an occupied territory and to change the demographic composition of an occupied territory. A number of reasons induced the Commission to include these acts in the draft article. Establishing settlers in an occupied territory constitutes a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide.

(8) Subparagraph (c) of paragraph 2 specifies another category of exceptionally serious war crimes covered by the draft article, namely, the use of unlawful weapons. This principle has already had a long history: the 1868 St. Petersburg Declaration prohibiting the use of explosive or inflammable projectiles of less than 400 grammes in time of war; the 1899 Hague Declarations prohibiting dum-dum bullets, prohibiting the discharge of projectiles and explosives from balloons, and prohibiting the use of projectiles diffusing asphyxiating or deleterious gases, the last of which was replaced by the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare 336/ and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; 337/ articles 22 and 23 of the regulations annexed to the 1907 Hague Convention with respect to the Laws and Customs of War on Land, articles which, among other things, prohibited the use of poison or poisoned weapons and the employment of arms, projectiles or material calculated to cause unnecessary suffering. Generally speaking, there has been some progressive development in this regard and it led to the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. At that Conference, held in Geneva in September 1979 and in September-October 1980, the following instruments were adopted by consensus: the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects; the Protocol on Non-Detectable Fragments (Protocol I); the Protocol on Prohibitions or Restrictions on the use of Mines, Booby Traps and Other Devices (Protocol II) and the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

(9) The wording of subparagraph (d), concerning the employment of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment is taken, word for word, from article 35, paragraph 3, and article 55 of Protocol I Additional to

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336/ League of Nations, Treaty Series, vol. XCIV, p. 65.

337/ General Assembly resolution 2826 (XXVI).

the Geneva Conventions. As to the definition of the concept of natural environment and protected objects deriving from that concept, reference is made to the commentary to article 26 of the draft Code, concerning wilful and severe damage to the environment. It should be noted that, in addition to the provisions in question in Protocol I, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted by the General Assembly on 10 December 1976, prohibits military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects, as a means of destruction, damage or injury to another party to the conflict. The Convention covers such techniques as changes in atmospheric conditions (clouds, precipitation, cyclones and tornados), changes in climatic conditions, ocean currents, the state of the ozone layer and the ionosphere, artificial earthquakes and tsumanis and disruption of a region's ecological balance. The subparagraph speaks of widespread, long-term and severe damage. For the interpretation of this expression, reference is made to the commentary to article 26, on wilful and severe damage to the environment. In addition, it should be pointed out that, under the subparagraph, it is a crime not only to employ methods or means of warfare intended to cause the damage mentioned above but also those which may be expected to cause such damage. This latter expression covers cases in which destruction of the natural environment was not the essential aim of the user of such methods or means of warfare, but, aware of the potentially disastrous consequences of such means or methods on the environment, he none the less decided to employ them. One member made a formal reservation on subparagraph (d).

(10) Subparagraph (e) covers "large-scale destruction of civilian property". The 1949 Geneva Conventions and Protocol I enunciate the principle of protection of civilian property in an armed conflict. Article 147 of the Fourth Convention considers that "destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" constitute a grave breach of the Convention. Similarly, under article 85 of Protocol I it is a grave breach to launch "an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii)" of the Protocol when the attack is committed wilfully, in violation of the provisions of the

Protocol and causes death or serious injury to body or health. In this regard, article 57, paragraph 2 (a) (iii), of the Protocol requires the parties to a conflict to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". The present subparagraph should therefore be read in the light of those provisions, taking into account the chapeau of paragraph 2, under which "an exceptionally serious violation of principles and rules of international law applicable in armed conflict" is a crime, and bearing in mind the term "large-scale", which relates to the extent and amount of the kind of destruction dealt with in subparagraph (d).

(11) Subparagraph (f) covers wilful attacks on property of exceptional religious, historical or cultural value. The comments in connection with the preceding subparagraph are valid in this regard, namely, it should be read in the light of the chapeau of paragraph 2 and the relevant rules of international law applicable in armed conflicts. It should be noted in this connection that article 53 of Protocol I to the Geneva Conventions prohibits "any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples"; using "such objects in support of the military effort" and making "such objects the object of reprisals". Protection of cultural property in an armed conflict is also a matter covered by the Hague Convention of 14 May 1954. In addition, Protocol I deems it a grave breach to direct attacks against the objects referred to in article 53, which are clearly recognized as such and to which special protection has been given by special arrangement (for example, within the framework of a competent international organization), causing as a result extensive damage, where there is no evidence of the violation by the adverse party of the prohibition on the use of such objects in support of the military effort, and such objects are not located in the immediate proximity of military objectives (art. 85 (4) (d)). Subparagraph (e) of this draft article highlights two elements in the definition of the crime: the wilful character of the attack, in other words an attack committed for the specific purpose of causing damage to the property, and the exceptional value of the property.

Article 26

Wilful and severe damage to the environment

An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to ...].

Commentary

(1) The Commission's concern regarding harm to the environment has already been reflected in the adoption on first reading of draft article 19, on State responsibility. Under paragraph 3 (d) of the article, "the safeguarding and preservation of the human environment" is already regarded as one of the fundamental interests of the international community and a breach of an obligation of essential importance for the safeguarding and preservation of the human environment has been defined as an international crime. 338/ In considering the draft Code, the Commission also took the view that protection of the environment was of such importance that some particularly serious attacks against this fundamental interest of mankind should come under the Code and the perpetrators should incur international criminal responsibility.

(2) The direct source of the present draft article is article 55, paragraph 1, of Protocol I Additional to the 1949 Geneva Conventions. It should none the less be noted that, unlike the provision contained in the Protocol, application of this draft article is not confined to armed conflicts, as is the case with the above-mentioned article.

(3) This draft article applies when three elements are involved. First, there should be damage to "the natural environment"; secondly, "widespread, long-term and severe damage", and lastly, the damage must be caused "wilfully".

(4) The words "natural environment" should be taken broadly to cover the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment. These words therefore cover the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements. It is worth recalling in this context article 2 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification

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338/ See *Yearbook ... 1976*, vol. II (Part Two), document A/31/10, text of article 19 on State responsibility, adopted on first reading.

Techniques, which was adopted by the General Assembly on 10 December 1976 and defines the expression "environmental modification technique" as "any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space".

(5) The expression "widespread, long-term and severe damage" is a special application to crimes against the environment of the general criterion of seriousness adopted for all crimes covered by the draft Code. The seriousness in this particular case is determined by three accumulative factors: the extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage. It was explained in the Commission that the word "long-term" should be taken to mean the long-lasting nature of the effects and not the possibility that the damage would occur a long time afterwards. Some members noted that one consequence of the word "long-term" would be to delay criminal proceedings, for it implied that the durability would be ascertained before any criminal proceedings were brought. Other members thought that the long-term nature of the effects could reasonably be assessed from the start of the damage.

(6) The last essential element in the definition of the crime lies in the word "wilfully", which refers to the express aim or specific intention of causing damage. This excludes from the scope of the draft article not only cases of damage caused by negligence but also those caused by deliberate violation of regulations forbidding or restricting the use of certain substances or techniques if the express aim or specific intention was not to cause damage to the environment. Some members of the Commission found that this solution was open to great criticism. In their opinion, if the deliberate violation of some regulations on protection of the environment, for example for the purposes of gain, led to widespread, long-term and severe damage, it would constitute a crime against mankind, regardless of whether the aim had been to cause damage to the environment. In the opinion of these members, article 26 conflicts with article 22, on war crimes, which also deals in its paragraph 2 (d) with protection of the environment. Under article 22 it is a crime not only to employ methods or means of warfare that are intended to cause damage but also might be expected to cause damage, even if the purpose of employing such methods or means has not been to cause damage to the environment.

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

177. The Commission, at its thirtieth session in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic. 339/

178. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 340/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

179. The Commission, at its thirty-sixth session, in 1984, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures

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339/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic, and to report to it thereon. For the report of the Working Group see Yearbook ... 1978, vol. II, (Part Two), pp. 150-152.

340/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add. 1 and 2, Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360, Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373, Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

referred to in the schematic outline 341/ and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 342/

180. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received six reports from the Special Rapporteur from 1985 to 1990. 343/ At its fortieth session, in 1988, the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General provisions) and Chapter II (Principles). 344/ In 1989, the Commission referred to the Drafting Committee also the revised version of those articles which were already referred to the Drafting Committee at the previous session. 345/

B. Consideration of the topic at the present session

181. At the present session, the Commission considered the Special Rapporteur's seventh report (A/CN.4/437 and Corr.1) at its 2221st to 2228th meetings.

182. The Special Rapporteur had prepared his seventh report, taking into account that this session of the Commission was the end of the quinquennium, and due to other priorities, the Drafting Committee had not been able to consider any of the draft articles referred to it by the Commission since 1988. Moreover, the position of the Commission was not entirely clear on some

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341/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

342/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

343/ For the six reports of the Special Rapporteur, see Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394, Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402, Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405, document A/CN.4/413 and Corr.1 (English only) and Corr.2 (French only), document A/CN.4/423 and Corr.1 and 2, and document A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only) and Add.1.

344/ For the text see Yearbook ... 1988, vol. II (Part Two), p. 9.

345/ See Report of the International Law Commission on the work of its forty-first session, (Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10) (A/44/10), p. 222, para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see ibid., (A/45/10), para. 471.

important issues forming the foundations of the topic. His seventh report had therefore been designed to reevaluate the development of the topic in the Commission and provide opportunity for the members of the Commission to reconsider their positions and views in respect of various aspects of the topic as well as its future direction. The seventh report was not intended to reopen the general debate, but rather to assess and summarize the situation. The report, while referring to the articles so far proposed by the Special Rapporteur and using them to illustrate various alternatives and approaches did not intend to focus the debate on the articles. To the contrary it was intended to encourage the debate on specific issues. The Special Rapporteur made that clear in his oral presentation of the report by inviting the members of the Commission, using his report as a basis, to address themselves to the following issues: the title of the topic, nature of the instrument, scope of the topic, principles important to the topic, prevention of transboundary harm, liability for transboundary harm, and finally the issue of harm to the "global commons". Since the debate in the Commission was focused on the issues raised by the Special Rapporteur, the report of the Commission on this chapter also follows that outline.

1. General issues

183. During the discussion, a number of issues of a general character were raised.

184. It was recalled that the topic was included in the Commission's programme of work in 1978 and that progress since then did not appear to correspond to the time that the Commission had devoted to the topic. It was recognized that the topic presented a number of difficult policy questions and clear answers to those questions were essential to making any considerable progress on the topic. For that reason many members found it useful to review once more the basic issues underlying the topic and make clear their positions on those issues still pending and reevaluate them in the light of further developments of international environmental law within and outside the Commission. It was noted that the Conference to be held in Brazil in 1992 afforded a welcome opportunity for the Commission to assess what had been achieved so far. Few members, however, did not find much utility in reviewing the Commission's work on this topic and thus, reopening the general debate. In their view that was a move backward. Instead, they felt the Commission should adopt a working hypothesis.

185. The importance of the topic was generally acknowledged and so was the understanding that the work on the topic should be expedited and be given priority. It was noted that various instruments on environmental issues were being drafted in other forums and the Commission's work might be overtaken if further rapid progress were not made.

186. Some members felt that it was time for the Drafting Committee to consider the 10 articles referred to it by the Commission since 1988. Particularly that those articles dealt with principles and their adoption would provide a firm basis for further development of the topic. They stressed the fact that the Drafting Committee had not been able to deal with any of those articles had deprived the Special Rapporteur of the benefit of its discussions in particular on the basic concepts of the topic.

187. Some other members felt differently. In their view before the Commission could embark on the adoption of articles, it should agree on the basic premises as well as the future direction of the topic. They found it difficult to see how the Commission could begin drafting an instrument without having some firm idea of its content and structure. In that context, some members maintained the view that, under current substantive law, there were no precise or general rules concerning liability stricto sensu and reparation, in particular, for transboundary harm caused by activities involving risk of such harm. That, in their view, was clearly an area in which progressive development was the appropriate choice.

188. A few members did not share the view that the topic involved an entirely new branch of law and one that had burst on the scene unexpectedly. They felt that there were already a number of existing legal instruments bearing on the subject which dealt with much the same kind of issues, as the present topic did. One member, in particular, mentioned that there were a wide variety of relevant norms not only in jurisprudence and conventional law but also in customary law. He mentioned among others some arbitral decisions such as those in Trail Smelter 346/ and Lake Lanoux 347/ as well as some existing treaties such as the 1958 Convention on the High Seas, the Treaty Banning

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346/ United Nations, Reports of International Arbitral Awards, vol. III, p. 1905.

347/ Ibid., vol. XII, p. 281.

Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the Outer-Space Treaty, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1982 Law of the Sea Convention, etc. as useful precedents for the topic since they also dealt with some environmental issues. In his view, the Commission's task was mostly to select principles relating to the environment, on the basis of existing treaty and customary international law, rather than to invent new law.

189. A view was also expressed that one way to facilitate progress on this topic was to distinguish between the different areas of its application. Only in that way could the Commission expect to win sufficient support for the draft articles, since as long as Governments did not fully understand the scope of the draft articles, they would be reluctant to commit themselves.

190. It was suggested by a few members that under the draft articles, submitted by the Special Rapporteur, the legal relationships were conceived as being bilateral: the affected State versus the author State. One member stressed that particularly with respect to the "global commons", that approach, although not wrong in itself, needed to be brought up to date. In most fields of life today, agreed international multilateral standards had become a relevant yardstick for measuring the acceptability of a given activity that might cause harm. Thus, many conflicts of interest were settled within a multilateral setting because of the existence of applicable standards. International standard-setting could be expected to increase considerably over the years to come, as regards both prohibition and prevention. That fact should be taken into consideration in the draft articles, even if reference could only be had to rules to be established by other bodies.

191. Some members remarked that in attempting to set out principles of international liability, the Commission not only had to take into account past precedents and contemporary thinking but also had to look to possible future developments and set clear and realistic objectives on what could be achieved within the next five years. The Commission should also be clear as to whether it was attempting to establish the principles which led to liability or was addressing the circumscribed subject of limiting liability. According to this view, the Commission would have to achieve both objectives, but not merely the latter objective.

192. Reference was made by one member to new studies including some by the United Nations which revealed that 80,000 compounds of various types of chemical substances were at present being commercially produced and that 1,000 to 2,000 new chemical products appeared every year on the market. The effects of that industrial activity, both on human health and on matters of transport, marketing, utilization or disposal of wastes, were being examined by international bodies and certain conventions and other instruments had been elaborated to establish, in this regard, either State control - mainly of a preventive character - or international cooperation. Consequently various conventions and legal instruments had been produced to deal with some of these specific matters. Apart from those specific fields, however, there were no precise rules on the consequences of the violation of a norm or on the conditions for the reparation due to the victims of harm caused by a hazardous activity. A few recent examples were cited in which there were no provisions on liability, i.e. in the 1986 Convention on Early Notification of a Nuclear Accident; the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency; the 1987 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; even the draft convention prepared in 1991 by the Economic Commission for Europe on the transboundary impacts of industrial accidents (document ENVWA/WG.1/R.3). The work of the Commission on this topic could, therefore, fill the lacuna.

193. Some members referred to the special situations of the developing countries. In their view the present topic should take into consideration the actual conditions of developing countries and formulate accordingly draft articles. It was noted that the Special Rapporteur had this in mind in his study on the topic and in fact proposed articles 3 and 7 dealing with attribution and cooperation respectively which took into account the situation of developing countries. However, it seemed to these members that the conditions of developing countries should be considered in a more systematic manner, for developing countries were mostly the victims of modern industrial production. Very often operators of activities involving risk and activities causing transboundary harm were transnational corporations over whose activities many developing countries often had no technological knowledge or means and financial resources for regulation of such activities.

This involved not only the problem of assistance to developing countries, but also the issue of liability in case of transboundary harm. As affected States, developing countries also faced many problems, such as lack of means for monitoring and assessing harm and lack of technology and financial resources to minimize certain harm.

194. Again speaking about the special needs of developing countries, one member pointed out that many of the world's peoples were forced to think first and foremost of satisfying their basic needs or to improve their standards of living, and meet the challenges of population growth and poverty. If, in order to obtain the technical, scientific and financial assistance of the most advanced countries, developing countries, having little to offer in return, had sometimes to pay the price in terms of national sovereignty or political, economic or cultural freedom, was it moral and equitable to apply to those countries the same standards of liability? A regime could not be considered equitable and based on a sense of justice if it ignored the disparities in standards of living between nations and was insensitive to the development needs of a majority of the people in the world.

195. A few members expressed concern about placing too much emphasis in this topic on the protection of the environment. One of these members stated that he agreed that the liability of States for activities which were not prohibited by international law could be involved in cases of harm caused to the environment and he did not minimize the importance of that problem. He believed, however, that the Commission, in its wisdom should refrain from bowing to fashion and that it should not forget that those activities could also cause human or economic losses, which the draft articles should take into account. He found it unfortunate if the Commission were to concern itself exclusively with the problem of the environment, however serious it might be, on grounds that it was at present the preoccupation of some of its members and of the international community. Another member felt that any rule aiming at the protection of the environment should be formulated in terms of prohibition and positive obligations with respect to prevention and that such rules were more appropriately placed in the topic of State responsibility than in this topic.

196. The Special Rapporteur concurred with the view expressed in the Commission to the effect that the Commission had reached a broad consensus on important areas of the topic on which he would comment later and which formed

a suitable basis for further work on the topic. With regard to the Commission's future work, he felt that there had been a consensus that the topic should be given high priority in the next quinquennium and that the Drafting Committee should begin at the next session with the examination of the first 10 articles referred to it.

197. The Special Rapporteur wholeheartedly agreed that the special situation of the developing countries should be borne in mind throughout the development of the topic. Finally, he concurred with the opinion expressed in the Commission that in the last 20 years during which environmental law had flourished many rules had been formulated more for specific activities but few rules had been developed in general terms. Similarly, little had been done to develop general rules on liability, apart from the exhortation to States contained in the Stockholm Principle 22. He felt strongly that certain general principles should be formulated, because international legal order could not afford to leave a gap that would reveal a lack of solidarity as to cast doubts on the very existence of an international community.

2. Specific issues

(a) Title of the topic

198. In his report the Special Rapporteur mentioned the difficulties with the English title of the topic which refers to "acts" not prohibited by international law, as opposed to the French title which refers to "activités". In his view, and as he had explained in his previous reports, the English title seemed to give the Commission a different and more restricted mandate than the French title did, whereas the English title seemed to allow only the examination of reparation or compensation for injurious consequences, the French title broadened the picture considerably. He felt that if the topic dealt with "acts" rather than "activities", prevention would have no place in the topic, because prevention was basically expressed in terms of prohibitions and the topic dealt with "acts not prohibited by international law"; that would cause a contradiction between the content and the title of the topic.

199. Most members agreed with the Special Rapporteur that the title of the topic could be changed from "acts" to "activities" which seemed to reflect more closely the evolving scope of the topic. While some of the members felt that the Commission could recommend to the forty-sixth session of the

General Assembly the change of the title, some others felt that the change of title could be left until later and meanwhile the Commission could proceed on the assumption that the English text of the title would refer to "activities", thus conforming to the French language. It was noted that if the title were to be changed to "activities", some other language versions would also have to be amended. A few members found the title of the topic, in general, cumbersome, complex and ambiguous and felt that it should be simplified by the proper qualification of the term liability. One member felt that the changing of the title was closely linked to the content of the topic.

200. Few members expressed the view that the Commission should confine the topic to "acts", because the failure to distinguish between acts and activities had been at the heart of the confusion regarding what constituted liability *sine delicto*. Besides taking into account that this topic was an offshoot of the topic of State responsibility in which the word wrongful "acts" were used throughout, it would be logical to move on in this topic from the area of wrongful acts to that of lawful acts. But to refer now to activities, including activities carried out by entities other than the State itself, rather than to acts of the State seemed to involve a shift in meaning and a departure from the mandate of the Commission.

201. In summing up the discussion, the Special Rapporteur concluded that it was generally agreed that the title of the topic should be changed so as to replace the term "acts" by "activities".

(b) Nature of the instrument

202. The Special Rapporteur referred to the nature of the instrument being drafted on this topic as one of the issues on which the views in the Commission were not unanimous. Some members felt that if the Commission did not concern itself with drafting rules for a convention which required acceptance by States, it could perhaps more easily accept certain hypotheses and draft articles. Others were in favour of an instrument of a binding character; a framework convention. One member stressed that what was needed was an "umbrella" framework convention, similar to the outer-space treaty, the conventions on human rights, and Part XII of the Law of the Sea Convention. He felt, however, a decision on this issue could be left for a later stage, while working in the meantime on the drafting of coherent, reasonable, practical and politically acceptable draft articles.

203. The discussion in the Commission on this issue developed in two ways: a majority agreed with the Special Rapporteur that a final decision on the matter could be delayed until more progress had been made on the topic. Others wanted to take a decision now on the nature of the instrument. Those who favoured a postponement thought it was premature to make a final decision on that subject at this early stage of the work.

204. It was stated that when at a later stage the Commission was ready to decide on the nature of the instrument, it should take into account that in the last decade or so, a number of conventions concluded on the basis of the Commission drafts, for one reason or another had proved unsuccessful. Therefore, in the future, the Commission should have careful deliberations before making any recommendations on the final form the draft articles should take, particularly when the draft articles were more in the nature of progressive development than mere codification as in the case of the present topic. In that context, it was noted that the Commission should make a decision only when it had received comments from Governments in respect of the proposed articles on the topic.

205. The Commission, it was suggested, should perhaps envisage the possibility of being more modest in its ambitions. The articles could conceivably be limited to the enunciation of principles or very general rules, spelling out only the essentials. These essentials should nevertheless be expressed in legal terms, establishing rights and obligations.

206. While agreeing that the decision on the nature of the instrument should be postponed, some members felt that the Commission should be aiming at a flexible framework convention establishing general principles of liability, including the circumstances under which liability arose; the role of prevention and due diligence; exemptions from liability; the criteria for compensation or reparation; the role of equity; the peaceful settlement of disputes; the role of international organizations and other forums; and the establishment by means of national legislation of effective standards and monitoring agencies.

207. On the other hand, those who wanted an immediate decision on the nature of the instrument were divided: some of them favoured a framework convention model and therefore one instrument of a binding character. They referred to present State practice which tended to regulate various specific activities, more particularly by binding bilateral or multilateral conventions. On the

whole they felt that the draft articles should be of a residual character; and be modest, leaving the establishment of specific regimes to bilateral or other multilateral agreements, which of course could draw inspiration from this draft.

208. Some other members, while agreeing that the Commission should not delay a decision on the final form of the instrument being drafted, proposed another alternative to a framework convention for the whole draft. In their view, too, the future work on the formulation of the draft would closely depend on the nature or character of the proposed instrument. If the draft articles were intended to be legally binding, at least the core part of that instrument would have to be drafted so as to reflect lex lata and be acceptable to most States. If on the contrary, it was to be recommendatory, or in the nature of a code of conduct, one could go much further in formulating rules and principles which would be new under present international law. However, the issue did not have to be resolved in a uniform way; the different sections of the draft articles could be formulated with varying binding force. The Commission might contemplate then, drafting two separate instruments: one dealing with liability and the other with prevention. The first of those instruments would be of a binding nature and the second would take the form of recommendations.

209. One member expressed reservations regarding a framework convention approach. In his opinion such an approach could lead to a mosaic of rules representing the very antithesis of codification. What was needed was a general convention containing a yardstick against which rights and duties could be measured with certainty.

210. One member, while agreeing with the idea of an immediate decision and of two separate instruments, favoured contrary to the former view, a flexible rule on liability and binding rules on preventive obligations. In his view, it would be appropriate for the Commission to propose standard clauses dealing with various aspects of the topic, including liability, which States could incorporate into their treaties and domestic legislation. According to this member, the issue took on an entirely different aspect with respect to the obligation of vigilance, whether or not combined with the prevention procedure envisaged by the Special Rapporteur. On that matter, it would make sense to move ahead and establish real draft articles according to the customary norms, which could be turned into a convention.

211. A few members pointed out that it was not possible to make a categorical distinction between so-called "soft law" and so-called "hard law". One member also rejected the earlier terminology purporting to distinguish between primary and secondary rules.

212. Summing up the debate on this point, the Special Rapporteur found that a majority of the members were in favour of postponing the decision on the nature of the instrument, although a few members would prefer the matter to be settled now. Therefore, it had to be inferred that the issue of making a recommendation to the General Assembly as to what should be done with the articles submitted to it was to be taken up at the end of the work on this topic, as was usually done.

(c) Scope of the topic

213. As regards the scope of the topic, the Special Rapporteur referred to his proposal made at previous sessions that it was appropriate for this topic to deal with activities involving risk of causing as well as those causing transboundary harm. By activities involving risk, he meant those which had a higher than normal probability of causing transboundary harm, by accidents and by activities causing transboundary harm (activities of harmful effects), he referred to those which caused such a harm in the course of their normal operation.

214. As to whether these two types of activities should be treated separately or together, the Special Rapporteur felt that they could be treated together, on the understanding that, if at the end of the exercise this method proved inappropriate, they could be separated. He referred to the original design of the topic provided by the schematic outline which dealt with, among others, cooperation, non-discrimination, prevention and reparation, measures which were relevant to both types of activities. It seemed to him that in so far as unilateral preventive measures such as adopting legislation and taking administrative actions were concerned, both types of activities required identical duties for States. As for procedural measures, they could apply regardless of the type of activity involved. Such measures included an assessment of the transboundary effect of an activity and consultation if such assessment indicated possible transboundary effect. The Special Rapporteur felt the views in the Commission and in the Sixth Committee were divided, but that there was a preference for the inclusion of both types of activities. In his view the Commission should discuss the matter further at this session.

215. Many members of the Commission agreed with the inclusion of activities involving the risk of causing as well as those causing transboundary harm. These two activities in their view were not mutually exclusive. On the contrary, obligations of prevention were relevant to activities involving risk and those of reparation covered activities with harmful effects. It was also noted that the concepts of "risk" and "harm" were sufficiently flexible to cover any regime to redress transboundary harm. As work on the topic progressed, the Commission should consider whether the two categories of activities were sufficiently close to come under a single legal regime or whether the differences justified separate sets of rules. In their view, there were rules common to the two kinds of activity but that did not preclude a few rules specific to each activity. In other words, there should be a common basic regime and it would probably be necessary to take account later of any special features linked to activities involving risk or to activities involving harmful effects.

216. Some other members, however, felt that the future instrument should deal primarily with reparation. In their view, almost all human activities involved an element of risk which meant that, for the purposes of this topic, some threshold for risk would have to be specified. In addition, the concept of risk might lead to confusion in the context of reparation because it could be wrongly regarded as the foundation of the obligation to make reparation or to compensate. It was also pointed out that the introduction of the concept of risk and its corresponding obligation of prevention might begin to encroach on the domain of State responsibility and also make the scope of the topic unmanageable. According to this view, the topic was based on a fundamental principle of equity: the innocent victim should not be left to bear his loss alone.

217. Expressing similar general view as stated in the previous paragraph, it was recalled that the former Special Rapporteur when introducing the concept of prevention in his third report 348/ explained that in establishing a regime of prevention, all loss or injury was prospective, and in establishing a regime of reparation, all loss or injury was actual. In that respect two proposals were made, dealing respectively with prospective harm or risk

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348/ See Yearbook ... 1982, vol. II (Part One), document A/CN.4/360.

and with actual harm. Under the proposal dealing with prospective harm, where activities carried out under the jurisdiction or control of a State appear to involve significant risk of causing substantial physical transboundary harm, that State should be required to (1) assess the risk and the harm; (2) take all possible measures within its power to eliminate or minimize the risk and to reduce the extent of the foreseeable harm; (3) provide information to the potentially affected States and, if necessary, enter into consultations with them, with a view to establishing cooperation for the adoption of further measures with the same purposes. Under the proposal dealing with actual harm the following would apply: (1) where substantial physical harm was caused to persons or things within the jurisdiction or control of a State as a result of activities carried out under the jurisdiction or control of another State, the former State was entitled to obtain from that other State compensation for the damages, unless compensation had been obtained under applicable rules on civil liability of the domestic legislation of the States concerned; (2) the compensation should in principle fully cover the damage, however the amount of compensation should be agreed upon by the States concerned, with recourse to determination by a third party, if no agreement was reached within a reasonable time; (3) reduction in the amount of compensation should be considered, taking into account the elements and circumstances of the specific situation, including the relative economic and financial conditions of the States concerned.

218. A few members found merit in distinguishing between the two categories of activities of risk and of harm if preventive measures were to be drafted in terms of binding obligations. However, the nature of risk needed to be determined for the purposes of this topic and particularly in respect of articles dealing with preventive measures. For example, some qualifications such as exceptional, serious, significant or grave risk could be used. This was the problem of threshold which arose in respect of both risk and harm. While not denying the link between harm caused by a lawful activity and liability, one member pointed out that if harm alone was taken as grounds for liability, it might lead to intrusion into the topic of State responsibility since harm could be the result of lawful and wrongful conducts.

219. One member was of the opinion that the categorization of activities between those involving risk and those involving harm, did not cover certain activities such as the construction of major works which could entail adverse

consequences for a neighbouring State, building airports or high-speed motorways, or burning of fossil fuels. These were activities carried out in every human society and called for specific rules. In his view, these situations characteristic of the contemporary society were different from the situation in the Trail Smelter arbitration, where specific and clearly identifiable damage was caused in the United States by a smelter in British Columbia. In the Trail Smelter situation, the focus was on the specific source of the noxious gases, but the general problem of air pollution, for example, could only be dealt with by introducing global quantitive limitations, a process that States had in fact embarked on by pledging to reduce by agreed percentages the quantities of, for example, gases destroying the ozone layer.

220. Many members addressed the question of a list of activities or dangerous substances, and they seemed to agree that such a list, in place of a general definition could place unnecessary and unjustifiable restriction on the scope of the topic. With respect to the list of dangerous substances, additional problems would arise. A listed substance, for example, might not mean that the activity related to that substance would necessarily create a risk of transboundary harm, whereas such a risk might be created by activities unrelated to a dangerous substance. A few members, however, felt that a list of dangerous substances could be made for the purposes of preventive measures and have an indicative character.

221. In his summing up of this part of the debate, the Special Rapporteur stated that in his opinion a majority in the Commission was in favour of including in the topic activities involving risk predominantly relevant to prevention and activities with harmful effects relevant to liability and compensation. He also found most members not favouring the inclusion of a list of dangerous activities or substances.

(d) Principles

222. The Special Rapporteur noted that there seemed to be a considerable support within the Commission as well as the Sixth Committee for the principles relevant to this topic and as formulated in articles 6 to 10 349/

349/ See document A/CN.4/437, paras. 17 to 24.

providing for the freedom of action and limits thereto, cooperation, prevention, reparation and non-discrimination. For example, the principle of the freedom of action and limits thereto, subject of article 6 350/ which was inspired by Principle 21 of the Stockholm Declaration, had received wide consensus. The same was true of the principle of international cooperation subject of article 7. As to the principle of non-discrimination, indispensable to the proper functioning of a system of civil liability, only very few objections were raised. The two principles which, in his view, raised a fair amount of discussion were the principles of prevention and reparation, the subjects of articles 8 and 9. He found general support in the Commission for these two principles when they were expressed in general terms. The variation of views appeared in respect of the detailed content of those principles. The principle of prevention, he explained, assumed two types of actions; *one* to be taken prior to occurrence of any transboundary harm and the *other* to mitigate harm, once it had occurred. This principle also provided for two types of obligations: *procedural obligations*, which consisted essentially of assessing the transboundary effects of the intended activity, notifying the State presumed to be affected and holding consultations, and *unilateral obligations* of a more substantive nature. The latter consisted of the adoption by States of the necessary legislative, regulatory and administrative measures to: (a) ensure that operators took all the steps to prevent harm; (b) minimize the risk of harm; or (c) limit the harmful effects that had occurred on the territory of the affected State.

223. As regards the principle of reparation, the Special Rapporteur noted that from among the three options, namely, civil liability, State liability, or a combination of the two, the latter seemed to have attracted more support. According to this approach compensation was the responsibility of the operator, under the principle of civil liability, with residual liability being assigned to the State; an approach which corresponded to that of a number of the existing conventions governing specific activities. Of course, the Commission, the Special Rapporteur noted, could consider extending the liability of the State to cases in which victims were unable to obtain any

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350/ See the revised version of article 6 referred to the Drafting Committee in 1989. *Supra*, note 345, document A/44/10, p. 222.

compensation because the liable private party, either had been unable to make restitution in full or could not be identified. In such cases, the question could be resolved on the basis of negotiations between the State of origin and the State presumed to be affected.

224. Most of the debate in the Commission concentrated on the principles of prevention and reparation. A summary of those discussions is made below under separate headings. In addition, comments were made in respect of other principles which are summarized below.

225. It was noted that for this topic provision on State freedom of action and the limits thereto, as contained in draft article 6, was most relevant. Such a provision modelled on Principle 21 of the Stockholm Declaration, recognized the sovereign right of a State to carry out lawful activities within its territory but at the same time stressed its responsibility to ensure that the activities did not cause transboundary damage to other States. It was pointed out that, in general, the principles referred to in the articles were all applicable to this topic. But in addition to those principles, it should be noted that the original design of the topic, set out in the schematic outline, was based on the principle sic utere tuo ut alienum non laedas, the first principle which met with general agreement in the Commission and which was placed at the very heart of the subject. That principle was supplemented by another principle namely the principle that the innocent victim should not be left to bear the burden of his loss, as well as the test of the balance of interests among the States concerned. Accordingly, the absence of any specific provisions to the effect that the innocent victim should not be left to bear his loss was considered to be a significant gap which must be filled, perhaps by incorporating it in article 9, on reparation or in article 6, on freedom of action within the limits it specified there.

226. A view was also expressed that the principles incorporated in articles 6 to 9 derived from general international law and therefore there could be no objection to including them in the draft. It was finally emphasized that the Commission had, after long debates, arrived at some important areas of agreement, such as (a) the principle of sic utere suo ut alienum non laedas; (b) the central theme of the topic was transboundary harm, whether threatened or actual; (c) the relevance of Stockholm Principle 21; (d) the proposition that the innocent victim should not be left

to bear the loss and (e) the important role for the balance of interests test in this topic. These and other areas of agreement formed a suitable basis for continuing with the topic.

(i) Prevention

227. During the discussion on prevention, a distinction was made between the procedural measures of articles 11, 13 and 14 (assessment, notification and information, initiative by the State presumed to be affected and consultation) on the one hand and the unilateral measures of prevention on the other hand. It was recalled that prevention was always one of the purposes of the topic, but within that broad aspect, the Commission never pronounced itself in favour of accepting as the primary aim of the draft articles to promote the construction of regimes to regulate the conduct of any particular activity which was perceived to entail actual or potential dangers of a substantial nature with transboundary effects.

228. Regarding the procedural provisions, it was noted that those of draft articles 11, 13 and 14 were too broad and included all sorts of activities. Those provisions created too much of an inhibition in respect of the right of States to conduct lawful activities within their own territories. The absence of a relationship between those procedural obligations and compensation once harm occurred was another reason for some members to be doubtful of the utility of such detailed procedures. According to those provisions non-compliance with procedural obligations, in the absence of any transboundary harm, did not constitute a basis for complaint. On the other hand, if harm did occur, the State of origin would be bound to make reparation even if it had strictly complied with the provisions on procedure.

229. Those members who favoured a separate non-binding instrument on prevention, felt that most of the provisions in articles 11 to 20 proposed by the Special Rapporteur could be placed in that instrument in the form of guidelines or of a code of conduct. That approach would have two advantages. The first was that it would avoid the use of the controversial notion of "activities involving risk". The second advantage was that it would draw attention to what measures should be taken in relation to ultra-hazardous activities. In that context certain conventions were mentioned such as the Vienna Convention for the Protection of the Ozone Layer and the Convention on Early Notification of a Nuclear Accident, which laid down rules and procedures

for prevention, and focused on the types of activities which called for preventive measures and on the rules and procedures necessary to prevent possible damage.

230. There was, therefore, a broad agreement in the Commission that even if procedural obligations were to be formulated they should be either annexed to the future instrument as an optional protocol or be left as mere recommendation. For some members, however, the duty to notify and to consult was not merely procedural.

231. A few members, on the other hand, found the establishment of simplified procedural measures, such as the assessment of transboundary impact of activities and notification and consultations useful because they dealt with activities not prohibited by international law and States were thus free to act without external interference. But the States that were potentially in danger remained unaware of any risk or harmful effects until such time as actual harm had occurred, unless States accepted a duty to notify and consult. In consequence, those States had no possibility of making preparations; they could act only when the harm was actually taking place, in other words, when it was already too late. Appropriate procedures were therefore needed to enable the State involved to be aware of potential risks. Yet implicitly, any procedures established for notification or consultation would not prevent States from carrying out their activities. The desirability of establishing such procedures was according to this view beyond doubt. The point was to find a means of reconciling the State's right to undertake any activities not prohibited by international law, with its obligations to ensure at the same time the protection of States at risk; a compromise which would require on the part of the Commission an approach that was both creative and realistic.

232. Regarding unilateral measures of prevention, some members favoured a stringent obligation of due diligence, by requiring a State in whose territory an activity involving risk of causing transboundary harm was conducted to take all the necessary precautions to prevent such harm and sanctioning its negligence in conformity with general international law. Under this approach States were left free to take whatever preventive measures they preferred within their own territory. This approach looked at the result and not the process or procedure.

233. As regards recommending to States the types of unilateral measures they could take through legislative and administrative measures, some members noted that such a recommendation would be useful if the objective was to harmonize or make more rigorous the existing preventive norms. In that case, two issues would have to be resolved: the determination of the threshold over and above which the affected State could demand prohibition of an activity and the mechanism by which disputes between the State of origin and the affected State with regard to the threshold could be settled.

234. One member felt that measures taken after the occurrence of a transboundary harm to mitigate harm should not properly speaking be regarded as preventive measures. Preventive measures in his view included measures taken prior to the occurrence of the harm in order to avoid it. Another member felt that if the obligation of due diligence were to be "hard", a system of compulsory settlement of disputes should be established. Such a system in his view was an integral part of any treaty regime.

235. The Special Rapporteur concluded in his summing up that there was a considerable body of opinion that the procedural obligations of the draft articles should be recommendatory only, and that that view reinforced the preference for two separate instruments of a different legal character. It was generally felt that whether or not obligatory, the procedures could be further simplified and that, in any case, prior consent of the potentially affected State would not be required before the activity could be authorized. Regarding unilateral measures of prevention, some members believed they should have a binding character.

(ii) Compensation

236. It was recalled that the idea of reparation was the fundamental consideration in the genesis of the topic. The primary aim indicated by the first Special Rapporteur was to promote the construction of regimes to regulate, without recourse to prohibition, the conduct of any particular activity which was perceived to entail actual or potential dangers of a substantive nature and to have transnational effects; it was a secondary consideration, though still an important one, that the draft articles should help to establish the incidence of liability in cases in which there was no

applicable special regime and injurious consequences had occurred. 351/ Three basic issues were raised in respect of liability and compensation: (i) the relationship between State liability and civil liability; (ii) what harm should be compensated, and (iii) the amount of compensation.

237. As regards the first issue, various views were expressed in respect of how liability could be allocated between the private operator and the State. The approach in finding a system under which both the operator and the State shared liability attracted more support.

238. It was noted by many members that the solution in assigning sole liability to either the State or the operator was difficult to accept and could in some cases mean no reparation. Article 3 of the draft signified that a State was not responsible for a private activity of which it might, in good faith, be unaware of the risk or the harmful effects. For example, many States, including the most developed, had been unaware for a number of years of the final destination of some of their waste products. In such cases, victims had not been able to seek redress from the State of origin and had been unable to obtain compensation. Such an approach was more important than ever in view of the global trend towards the withdrawal of States from commercial activity, with the concomitant encouragement of private enterprise.

239. A proposition that States would agree to assume financial responsibility vis-à-vis non-nationals for all acts by private entities or individuals under their jurisdiction was considered by some other members to be unrealistic. It was pointed out that the Convention on International Liability for Damage caused by Space Objects, under which States had assumed absolute liability, was drafted on the assumption that all future space activities would be carried out by States or under their control; that assumption did not exist in respect of the present topic. Absolute liability of States could not, therefore, be extended in respect of activities which were essentially private. The solution assigning sole liability to the operator also had drawbacks: for example, harm might be so substantial as to result in insolvency on the part of the operator, thus leaving the victim without adequate compensation or even with no compensation at all.

351/ Preliminary report by the first Special Rapporteur, Professor Quentin-Baxter, Yearbook ... 1980, vol. II (Part One), p. 250, para. 9.

240. The equitable solution was found by many members to be in a type of joint liability, but it was still to be determined whether primary liability should be assigned to the State or the operator. In making such a determination, a number of factors were mentioned that should be taken into account; including whether or not a State had taken all reasonable precautions to avoid transboundary harm, whether the private operator was solvent, whether the private operator could be identified; the particular situation of the developing countries, etc.

241. Many members agreed that the principle that the innocent victim should not be left to bear the loss alone and the maxim *sic utere tuo ut alienum non laedas* was the basis for requiring that compensation should be paid when activities, even though lawful, cause transboundary harm. It was also emphasized that the principle of liability should be based *not* on risk, but on the concept of harm.

242. It was noted by some members who favoured the assignment of the primary obligation of liability to private operators that all the relevant conventions, with the exception of the Convention on International Liability for Damage caused by Space Objects, seemed to have placed liability on the operator. Those conventions clearly defined the obligation of States to: (a) take the necessary measures for protection of, and response to transboundary harm; (b) ensure that activities within their jurisdiction and control were carried out in conformity with certain provisions; and (c) ensure that recourse was available, in accordance with their legal systems, for compensation and relief in respect of transboundary damage caused by activities within their jurisdiction and control, that was also the approach of articles 139 and 235 of the United Nations Convention on the Law of the Sea. Some members pointed out that most of the conventions relating to liability of private operators had been elaborated for the purpose of limiting the liability of the private operator, although those conventions were clearly founded on the principle that the operators, or States, would be liable to make compensation for appreciable damage.

243. In the view of some members, in the absence of failure by a State to comply with its obligation, the operator should bear liability. The State, according to this view could then be assigned residual liability, in particular in the case of partial or total insolvency of the operator.

A view was expressed that even for the assignment of residual liability to a State, there should be a theoretical basis which seemed absent from the present approach to the topic. The question remained open why a State should be liable if it had adopted laws and regulations and had taken administrative measures reasonably appropriate for securing compliance by persons under its jurisdiction. This was where, according to this view, the concept of risk came to play. First, that concept provided the basis for specific obligations of prevention. Secondly, it provided the grounds, in the case where damage occurred, for invoking the subsidiary liability of the State if the operator was unable to respect its obligation to make reparation. As to the case of inability to identify the responsible operator, the question was why the State should be liable for damages in cases where the harmful effect originated in an entire region or was the result of the regular activities of industrialized States, as in the case of the depletion of the ozone layer. According to this view, it would not be easy to successfully approach such cases on the basis of a philosophy of reparation alone.

244. It was also noted by some members that apart from the absence of a generally recognized regime of residual or strict liability of the State in the existing conventional regimes, the domestic laws of many States did not recognize such State liability either, even in cases where reparation was not obtained from an operator under the civil law procedure. It was mentioned that the Trail Smelter principle might not be applicable in all cases regardless of the actual situations in which transboundary harm occurred. Article 139, paragraph 2, of the United Nations Convention on the Law of the Sea, and article 4, of Annex III thereto were mentioned as having provided a typical illustration of the reluctance of States when it came to bearing liability for activities conducted by contractors even when such activities were sponsored by States. That indicated some hesitations among States in recognizing that the existing rules of international law recognized the automatic application of the principle of strict liability of the State, even if it was only residual liability. Under this view, the principle of compensation should, therefore, be set forth in general terms only, and should not go so far as to cover causal liability under the civil law and the residual liability of the State. Those issues would be better dealt with under instruments covering well-defined areas, such as nuclear damage and

environmental pollution caused by oil spillage, etc. The assignment of primary liability to the operator was considered by some members, the best solution when taking into account the special situation of the developing countries. Particularly when the private operators were multinational corporations with budgets several times greater than those of many developing countries, there was no reason why they should not bear primary liability.

245. A view was also expressed that the question of the obligation to make reparation was not yet ripe for codification, at least in the form of a convention. According to this view, if it was found necessary to go so far as to deal with reparation, it should be limited only to the liability of the operator with no residual liability for the State. This view, therefore, favoured drafting model clauses dealing with civil liability and encouraging States to adopt them in their internal law.

246. Some members did not think it was necessary to go into details of civil liability rules. Such rules were treated differently under various domestic legal systems and that made the introduction of civil liability regime into international law a very difficult task. These members thought that it might even be undesirable to insist on harmonizing domestic laws in that regard. They felt it would be better to leave it to States to make what provisions they saw fit for the operator to be made liable for transboundary harm.

247. It was also suggested that perhaps the articles could deal only with essential matters of civil liability such as for example, that once compensation had been obtained under civil liability procedure from an operator, there should be no claim against a State; or that there should be a non-discrimination clause in respect of remedies and access to courts and tribunals of a State.

248. Some other members pointed out that in establishing the relationship between the civil liability and State liability, a well-recognized principle of international law of the diplomatic protection should not be overlooked. That principle was accompanied by another, namely that individual claimants should first exhaust domestic remedies before seeking diplomatic protection. These two principles seemed to support, in their view, the proposition that private operators should bear primary liability and in circumstances, when remedy through domestic channels proved unavailable, States bear residual or subsidiary liability.

249. Some other matters were also raised in respect of the allocation of liability between a State and an operator. For example, it was pointed out that some activities with adverse transboundary effects were conducted by States directly; States were the operators. The Commission would have to decide whether, in such circumstances, to uphold State liability directly, or still require the exhaustion of civil liability remedies under the domestic law of the State concerned. In such circumstances, similar to the situation of private operators, the amount of damages might be considerably high. In order to ensure compensation, an intergovernmental fund might be created.

250. As regards the second issue, namely what harm should be compensated, it was noted that a decision had to be made as to whether all appreciable or significant harm caused should be compensated or only appreciable or significant harm which resulted from an activity which was known to involve risk. The latter was found by some members to be too narrow. It was noted that some members of the Commission were of the view that States would not be prepared to accept the former, which was within the field of progressive development of international law. But it was felt by some members that the Commission would not be out of order in taking a progressive approach. An approach upholding compensation for all appreciable or significant harm caused was found also by these members more compatible with the view that the topic should be based on the concept of damage and that there should be no listing of activities or dangerous substances.

251. As regards the third issue, namely the amount of compensation, it was recalled that the Special Rapporteur had suggested that that question should be settled by negotiations between States. It was stated that the Commission should lay down the parameters within which such negotiations could be held. Such negotiation should also be governed by the principle according to which a delicate balance should be maintained between the need for permanent negotiations between States and respect for the normative content of international law. For example, the question of the foreseeability of risk, it was mentioned could have an effect on the amount and form of compensation - a term found preferred to reparation, since it evoked images of State responsibility.

252. Another view was expressed to the effect that the determination of compensation on the basis of negotiations between States might prove ineffective. It should be borne in mind, it was noted, that, in principle,

harm must be fully compensated; a principle which could be complemented by two elements. The first would be an indication that a reduction in the amount of compensation (from full compensation) should be considered, taking into account the factors and circumstances of the specific situation, including the relative economic and financial condition of the States concerned. The second was that there should be a provision of recourse to a third party for the determination of the amount of compensation, failing agreement within a reasonable time.

253. The Special Rapporteur in his summing up of this part of the debate stated that he found the idea that the innocent victim should not be left to bear the loss alone had been explicity supported by the majority of the members of the Commission and that no objection against it had been raised. He also stated that the dominant trend of views in the Commission was in support of a combined liability of private operator and a State, in which the former carried primary liability and the latter residual liability.

(e) Global commons

254. Some members addressed the issue of harm to the "global commons". Views of these members differed as to whether the Commission should deal with this problem at this time or within the context of this topic. These members, however, all agreed that the problem of continuous deterioration of the human environment was a serious matter with universal implications which needed to be addressed by the Commission.

255. Those members who did not think that the problem of the "global commons" should be included within the context of this topic, based their reasoning on the difficulty of reconciling the theoretical foundations of the liability topic with what was needed to approach harm to the "global commons". They recalled that from the beginning the Commission had worked on the present topic on the assumption that the topic was concerned with harm emanating from activities conducted in the territory, under the jurisdiction or control of one State and affecting persons or property in another State. In such a situation both the State of origin and the affected State were easily identifiable and the harm caused was assessable. However, harm to the "global commons", in the view of these members, raised different issues, including the difficulty in determining the State or States of origin, the affected State, the assessment and determination of harm, etc. In addition, they referred to

the right to compensation and the obligation of prevention of harm which were difficult to implement if no single State could be identified as the affected State or the source State. For these reasons they did not find it appropriate to include the problem of harm to the "global commons" in the present topic. They suggested that the Commission list the issue in its long-term programme of work, or to study the matter when the work on the liability topic was completed. A few other members felt the issue of harm to the "global commons" was not mature enough for the Commission to lay down general principles of international law in that respect.

256. Some other members felt differently. They pointed out that Stockholm Principle 21 specificially referred to areas beyond national jurisdiction. In the view of some of them, even if presently there were no applicable rules of international law protecting the "global commons", some ought to be found, but of course, not without studying the manifold dimensions of the subject. In that context the view was also expressed to the effect that the Commission should not take an unduly conservative approach and should come in touch more closely with the general orientation of the international community, which was increasingly asserting the importance of protecting the "global commons". It was stressed by some members that the concept had found expression in numerous international and regional forums and decisions, including Principle 21 of the 1972 Stockholm Declaration; General Assembly resolution 43/53, which had explicity stated that climate change was a "common concern" of mankind; etc. In addition, the need to protect intergenerational equities had been receiving increasing emphasis within the context of sustainable development and environmental law.

257. It was pointed out that the Commission could formulate a set of articles on the protection of the "global commons" and even make proposals on the agencies responsible for implementing them. For example, the Trusteeship Council's mandate could be changed and be extended to cover the protection of the resources of the "global commons". At the very least, the Commission should work out a more detailed definition of the meaning of an obligation _erga omnes_ with regard, for example, to pollution of the high seas and the outer space and the ozone layer and determine as to areas within and beyond national jurisdiction current conditions for the exercise of an _actio popularis_ with regard to the resources of the "global commons".

258. It was mentioned that it would not be in the interest of the Commission to say that it was starting anew. Rather, it had to take earlier environmental matters into account. Climate change was mentioned, an example that had been a matter of concern for nearly 20 years. Reference was made to a recommendation of the Stockholm Action Plan which provided that Governments should carefully evaluate the likelihood and magnitude of the climatic effects of planned activities and should disseminate their findings to the maximum extent possible before embarking on such activities. Another recommendation was that Governments should consult fully with other interested States when activities carrying the risk of such effects were being contemplated or implemented. The issue of climate change had even been referred to in treaty instruments, among them, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. There were therefore a number of instruments which could be used to deal with issues relevant to the "global commons". For these members, it was important not to delay work on the problems of the "global commons". For this reason a few members preferred to make the protection of the "global commons" subject of a separate topic.

259. Responding to views expressed on this issue, the Special Rapporteur felt that the Commission should not yet make a decision as to whether or not the problems of the "global commons" should be dealt with within the context of the present topic until a further examination of the matter could be made.

CHAPTER VI

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

(second part of the topic)

A. Introduction

260. The topic entitled "Relations between States and international organizations" has been studied by the International Law Commission in two parts. The first part relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session, in 1971 when it adopted a set of draft articles and submitted them to the General Assembly. 352/

261. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference, which was convened in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. 353/

262. At its twenty-eighth session, in 1976, the Commission commenced its consideration of the second part of the topic, relating to the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States. 354/

263. Between the twenty-ninth (1977) and thirtieth (1978) sessions of the Commission, the former Special Rapporteur submitted two reports, which were considered by the Commission. 355/

352/ Yearbook ... 1971, vol. II (Part One), pp. 284 et seq., document A/8410/Rev.1, chap. II, sections C and D.

353/ Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations, vol. II, Documents of the Conference (United Nations publication, sales No. E.75.V.12), p. 207, document A/CONF.67/16.

354/ Yearbook ... 1976, vol. II (Part Two), p. 164, para. 173.

355/ See Preliminary Report, Yearbook ... 1977, vol. II (Part One), p. 139, document A/CN.4/304 and Add.1; Second report, Yearbook ... 1978, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1. For a summary of the discussion of both reports in the Commission, the conclusions reached and the action taken by the Secretariat see Report of the International Law Commission on the work of its thirty-ninth session, (Official Records of the General Assembly, Forty-second Session, Supplement No. 10), A/42/10.

264. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Diaz-Gonzalez Special Rapporteur for the topic. [356]

265. Owing to the priority that the Commission had assigned, on the recommendation of the General Assembly, to the conclusion of its studies on a number of topics in its programme of work with respect to which the process of preparing draft articles was already advanced, the Commission did not take up the study of the present topic at its thirty-second session, in 1980, or during the subsequent sessions, and only resumed its work on it at the thirty-fifth session, in 1983.

266. Between the thirty-fifth (1983) and forty-second (1990) sessions of the Commission, the Special Rapporteur submitted five reports. [357] In the course of 10 sessions, the Commission adopted a set of preliminary decisions on the topic, in one of which it adopted a schematic outline of the subject-matter to be covered by the draft articles to be prepared by the Special Rapporteur on the topic. [358]

267. At its forty-second session, in 1990, owing to lack of time, the Commission was unable to take up the Special Rapporteur's fifth report.

B. Consideration of the topic at the present session

268. At the present session, the Commission had before it the fifth report of the Special Rapporteur (reissued in its complete version, as document A/CN.4/438 and Corr.1 (Spanish, English and Russian only) and Corr.2 (Spanish only)), and his sixth report (A/CN.4/439).

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[356] Yearbook ... 1979, vol. II (Part Two), p. 189, document A/34/10, para. 196.

[357] First report, Yearbook ... 1983, vol. II (Part One), document A/CN.4/370. Second report, Yearbook ... 1985, vol. II (Part One), document A/CN.4/391 and Add.1. Third report, Yearbook ... 1986, vol. II (Part One), document A/CN.4/401. Fourth report, Yearbook ... 1988, vol. II (Part One), document A/CN.4/424 and Corr.1. Fifth report, Yearbook ... 1990, vol. II (Part One), originally issued in 1990 as document A/CN.4/432, and reissued, in complete form in 1991 as document A/CN.4/438 and Corr.1 (English, Russian and Spanish only).

[358] For a fuller summary of the historical background to the topic, see the Report of the International Law Commission on the work of its forty-first session, (Official Records of the General Assembly, Forty-fourth session, Supplement No. 10, (A/44/10)), paras. 686-707. The text of the outline is reproduced in footnote 269 to that report.

269. In his fifth report, the Special Rapporteur considered the question of the archives of international organizations and submitted draft article 12 on that question. The report also dealt with the question of the publications and communications facilities accorded to international organizations and, with special reference to communications, considered the questions of codes, the diplomatic bag, the diplomatic courier, postal services and telecommunications, particularly radio stations. The Special Rapporteur also submitted draft articles 13 to 17 on publications and communications.

270. In his sixth report, the Special Rapporteur made a detailed study of the practice of and problems surrounding fiscal immunities and exemptions from Customs duties enjoyed by international organizations and submitted draft articles 18 to 22 pertaining thereto.

271. The Commission considered the fifth and sixth reports of the Special Rapporteur at its 2232nd and 2236th meetings.

272. The Commission, at its 2236th meeting, referred draft articles 12 to 22 to the Drafting Committee. The comments and observations of members of the Commission on the draft articles are summarized below.

273. In introducing his fifth and sixth reports, the Special Rapporteur said that those two reports completed the study of the first part of the draft, concerning international organizations, i.e. sections 1.A and 1.B of the schematic outline of the topic adopted by the Commission. 359/ That left the matters referred to in sections 2 and 3 of the draft outline, namely, international officials and experts on mission for, or persons having official business with, the organization, still to be considered.

274. With regard to his fifth report and, in particular, the section dealing with the archives of international organizations, the Special Rapporteur said that, like States, international organizations were in permament communication with member States and with each other. They maintained a steady correspondence with public and private institutions and private individuals. They kept files on their staff, on projects, on studies, on research and on any other type of action in which they might be involved, with a view to achieving the aim for which they were created. They also possessed a body of

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359/ See ibid.

documentation which was the backbone of their operations. The protection and safekeeping of all such documentation was what constituted the archives of international organizations.

275. In order to preserve, protect and safeguard the confidentiality of those archives and to protect, not only their own safety and their right to privacy and private property, but also the safety and privacy of documentation addressed or entrusted to them, particularly by their member States, intergovernmental international organizations must enjoy inviolability of their archives.

276. The inviolability of archives was based on two fundamental principles: non-interference and protection, as in diplomatic law. The issue was one of protecting not only secrecy, but also the place where the secret was kept. In the case of diplomatic and consular missions, the receiving State was under an obligation not only to refrain from trying to penetrate the secret, but also to protect it by respecting the place where it was kept, and even to prevent third parties from violating it. The right to privacy, in other words to secrecy, was recognized as a basic element guaranteeing the freedom of action and functional efficiency of international organizations. Respect for privacy and the preservation of secrecy constituted the very basis of the independence of international organizations, to which they must be entitled if they were to fulfil properly the purposes for which they had been established.

277. With regard to the publications of international organizations, the Special Rapporteur said that it was hardly necessary to prove that publications were the chief form of expression for international organizations. Consequently, the scope of the term "publications", as normally employed by international organizations both in legal documents and in practice, was much broader than was usual in domestic law. The breadth of the term varied, of course, from one document to another, as could be seen from the analysis in the report. International organizations must therefore enjoy the fullest guarantees not only with regard to the inviolability of their publications, but also with regard to the free distribution and circulation of the information required for the conduct of their activities.

278. The means of communication made available to international organizations had to be identical to those employed by States or diplomatic missions. Consequently, the draft equated international organizations to diplomatic missions so as to enable them to use the same means of communication.

279. The Special Rapporteur recalled that the European Committee on Legal Cooperation had issued the following opinion on the question: "Not all international organizations need to use couriers or to have special facilities for sealed bags, codes and ciphers. In the case of many organizations, access to ordinary postal and telecommunications service should be sufficient". 360/ However, whether or not all international organizations necessarily needed to use all the exceptional means of communication should not be of major concern. The principle should be recognized, as it generally already was, and applied in appropriate cases. In cases where the functions of the organization did not warrant application of the principle, the organization should have the authority to waive it. In any event, with the increasingly sophisticated advances in radiotelephonic and radiotelegraphic communications technology (telex, facsimile, etc.) the issue would become less and less important. In future, and to a large extent at present, the priority would simply be to have the appropriate equipment installed and to be accorded preferential tariffs and rates for the applicable taxes and service charges.

280. The Special Rapporteur mentioned, in particular, the possible use by international organizations of the diplomatic courier and the diplomatic bag and recalled the draft articles on the diplomatic courier and the diplomatic bag recently elaborated by the Commission, 361/ and the discussion in the Commission and the Sixth Committee on whether the scope of the draft articles should be extended to diplomatic couriers and diplomatic bags of international organizations. Although many members and States had been in favour of the possible extension of the draft to the diplomatic couriers and bags of international organizations, the Commission, in the light of objections by a number of its members and by some States, had decided against such an extension in order not to jeopardize the acceptability of the draft articles as a whole. However, a draft optional protocol had been prepared to provide for the possible extension of the scope of the draft articles for States acceding to it. That was why draft article 16 referred to "the provisions of multilateral conventions in force".

360/ Council of Europe, op. cit., p. 37, para. 81.

361/ Report of the International Law Commission on the work of its forty-first session, (Official Records of the General Assembly, forty-fourth Session, Supplement No. 10 (A/44/10).

281. Referring to the sixth report, and in particular to the fiscal immunities of international organizations, the Special Rapporteur noted that the fiscal immunity which States granted each other in their mutual relations was in fact the counterpart of equality. Under the principle of sovereignty and equality between States, a State could not be viewed as being subject to the tax levying authority of another State. That principle had been established both by custom in international law and by practice in international relations and had even been confirmed in bilateral and multilateral agreements, or by unilateral decisions of States, at least as far as property intended for State purposes was concerned. The tax exemption granted to intergovernmental international organizations also appeared to be justified by the same principle of equality between member States. The State could not levy taxes on other States through an international organization, and the host State must not derive unjustified fiscal benefit from the presence of an organization on its territory.

282. With regard to the exemption of international organizations from Customs duties, the Special Rapporteur said that, in order to perform their official functions effectively, intergovernmental international organizations must enjoy the greatest possible independence in relation to the States of which they were composed; that independence must not be restricted in any way. Accordingly, the principle of the free movement of the articles and capital of international organizations appeared to have been accepted and constituted one of the basic elements for preserving and guaranteeing that independence. However, although the free movement of the articles of international organizations was fundamental and necessary for the fulfilment of the purposes for which they had been established, States naturally had the right to protect themselves against abuse or any erroneous interpretation of the principle which might allow the true aim of the principle to be distorted. A balance must therefore be struck between the two principles: that of the free movement of the articles which international organizations imported or exported for their official use, and that of the right of the State to protect its interests and security.

283. Referring in general to the fifth and sixth reports of the Special Rapporteur, some members of the Commission touched incidentally on the usefulness of the topic before the Commission. While it was true that there were a number of multilateral conventions and headquarters agreements

governing matters relating to the privileges and immunities of international organizations, it would be a mistake to conclude that the topic was of little use. On the contrary, it afforded the Commission an excellent opportunity to perform a classic codification exercise, by organizing and systematizing existing norms, which contained many inconsistencies, extracting the factor common to them all and establishing clearly the essential minimum to which international organizations were entitled in that regard. Much careful drafting would be involved, so that the Drafting Committee's role would obviously be of paramount importance. The Commission's task might also involve various aspects of progressive development in the regulation of relatively new areas of international relations, such as the use by international organizations of satellite communications or the special and highly sensitive questions that might be raised by the future extension of peace-keeping operations.

284. It was emphasized that the main criterion which should be applied in granting privileges and immunities to international organizations was functional necessity. In that regard, some members said that, while the Special Rapporteur appeared to agree in general with that criterion, in some instances, some of the proposed articles, or the observations made in proposing them, appeared not to be fully compatible with it.

285. Some members referred to the part of the fifth report dealing with the archives of international organizations and generally supported the observations made by the Special Rapporteur in his report regarding the importance of such archives and the need to safeguard their confidentiality and ensure their inviolability. It was emphasized that States must refrain from any administrative or jurisdictional coercion regarding such archives. One member wondered whether the question of the inviolability of archives should not also include respect for and protection of the emblems, names and, in some cases, flags of international organizations. It was pointed out that the inviolability of archives, whether documents for internal use such as the staff files of the organization, or for external use such as correspondence with member States and other international organizations, was essential to enable the organization to function effectively. The organization must be the sole judge of the degree of secrecy or confidentiality necessary, since the

functional justification was borne out by a number of international instruments, including the Convention on the Privileges and Immunities of the United Nations.

286. With specific reference to draft article 12 362/ proposed by the Special Rapporteur, several members of the Commission, while in general supporting the content of the draft article, suggested a number of improvements. With regard to paragraph 1, for example, one member said that it might be appropriate to include a reference to the host State's positive or active obligation to protect the archives of international organizations. Another member expressed the view that the words "in general" in paragraph 1 could be interpreted as meaning that the documents of an organization were not always inviolable and therefore proposed that the words in question should be deleted. With regard to paragraph 2, a number of members supported the inclusion of the definition of archives in the body of the relevant article rather than in a general article on definitions. Some members proposed broadening the scope of the definition to some extent. One member proposed including in the concept of archives the premises where they were kept which, in his view, should enjoy a greater degree of protection than other premises of international organizations. Other members advocated broadening the definition of archives to include modern means of communication such as computer files, electronic mail and word processors. One member proposed that

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362/ Draft article 12 as proposed by the Special Rapporteur read as follows:

"Article 12

1. The archives of international organizations and, in general, all documents belonging to or held by them shall be inviolable wherever they are located.

2. Archives of international organizations shall be understood to mean all papers, documents, correspondence, books, films, tape recordings, files and registers of the international organization, together with ciphers, codes, and the filing cabinets and furniture intended to protect and conserve them."

the words "archives of international organizations shall be understood to mean" should be replaced by "the archives of international organizations shall include". Another member suggested that the words "shall be understood to mean" should be followed by the words "in particular".

287. Several members referred to the part of the fifth report concerning publication and communication facilities. With regard to publications, they supported the Special Rapporteur's approach and said that international organizations must be entitled to publish and circulate their documents and publications. In the case of the United Nations, for example, that freedom derived from the provisions of the Charter and was guaranteed by the 1946 Convention on the Privileges and Immunities of the United Nations. That Convention also established that United Nations publications were exempt from Customs duties and from any import or export restriction or prohibition, without prejudice to the possible resale of such publications.

288. With specific reference to draft article 13 363/ submitted by the Special Rapporteur, one member said that it would be useful to draw the attention of the Commission to a commentary prepared by the Sub-Committee on Privileges and Immunities of International Organizations, which was an organ of the European Committee on Legal Cooperation. According to that commentary, while the distribution of an organization's publications should be facilitated by member States, those States should retain the right to take the necessary measures to protect public order. Another member expressed the view that article 13 could also refer to the latest distribution technologies, such as magnetic disks, diskettes and other computerized products.

289. Several members stressed the need, in general, of international organizations to enjoy full freedom with regard to communications facilities.

363/ Draft article 13 as proposed by the Special Rapporteur read as follows:

"Article 13

> International organizations shall enjoy in the territory of each State party (to this Convention) the free circulation and distribution of their publications and public information material necessary for their activities, including films, photographs, printed matter and recordings prepared as part of the public information programme of an organization and exported or imported for display or re-transmission, as well as books, periodicals and other printed matter."

Only in that way could they function properly and circulate and disseminate ideas and the results of the tasks entrusted to them. That freedom, however, should be subject to the proper application of the functional criterion. For example, although, because of the scope of their purposes and functions, some organizations such as the United Nations needed to use all available means of communication, other organizations which were more limited in scope, did not really need to use the whole range of existing means of communication. Such distinctions were particularly important in the case of some means of communication such as radio and television stations. In that connection, some members said that one of the useful functions which the future article could perform was to regulate relatively new areas, such as the access of international organizations to satellite telecommunications. Again with regard to communications facilities, some members recalled that, under their Conventions on Privileges and Immunities, the United Nations and the specialized agencies were entitled to use diplomatic couriers and diplomatic bags. The draft adopted by the Commission on diplomatic couriers and diplomatic bags was, however, limited to the couriers and bags of States, although there was an optional protocol which provided for the extension of the articles to the couriers and bags of international organizations of a universal character. Some members were of the view that, possibly within the scope of the topic under consideration, the Commission could go a little further in regulating diplomatic couriers and diplomatic bags.

290. With specific reference to draft article 14, 364/ one member considered that its wording could be simplified to establish only the general principle

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364/ Draft article 14 as proposed by the Special Rapporteur read as follows:

"Article 14

> International organizations shall enjoy, in the territory of each State party (to this Convention) in respect of such organizations, for their official communications, treatment not less favourable than that accorded by the Government of such State to any other Government, including the latter's diplomatic missions, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone, telefax and other communications, and press rates for information to the press, cinema, radio and television. However, the international organization may install and use a wireless transmitter only with the consent of the host State."

that, in respect of communications, international organizations should receive, in the territory of a State party to the draft Convention, treatment not less favourable than that accorded by that State to any other Government, including the latter's diplomatic missions. Another member objected to the second sentence of the article, which made the installation and use of a wireless transmitter subject to the consent of the host State.

291. Diverging opinions were expressed on draft article 15 as proposed by the Special Rapporteur. 365/ For example, while one member found the article fully acceptable, another was not convinced that it was necessary. That member considered that paragraph 1 was redundant, in view of the existence of draft article 12, and that paragraph 2 was superfluous. Another member proposed that paragraph 2 should be deleted and that the article should be amended to read: "The official correspondence and other official communications relating to an international organization and its functions shall be inviolable". Still with regard to paragraph 2 of the draft article, one member thought that it was not in keeping with the strictly functional approach, since it was not enough for correspondence and communications to relate to the organization in order to be considered official and inviolable. They had to be necessary to the accomplishment of the purposes of the organization or have some bearing on those purposes. Another member criticized that paragraph as not being specific enough, since, in his view, it should refer to any correspondence and communications "dispatched by" or "addressed to" an organization.

365/ Draft article 15 as proposed by the Special Rapporteur read as follows:

"Article 15

The official correspondence and other official communications of an international organization shall be inviolable.

Official correspondence and official communications mean all correspondence and communications relating to an organization and its functions."

292. With regard to draft article 16, 366/ one member found it generally satisfactory, although he questioned the need for a reference to diplomatic couriers, who were, in his view, rarely used by international organizations. He thought that that question could be left to be regulated by specific headquarters agreements. Another member questioned the need for an article which merely referred to the provisions contained in existing conventions and did not establish any separate rules. In connection with the reference to existing conventions, another member questioned the words "in force", which he regarded as inappropriate, since conventions could be in force without necessarily being binding on all States. There could be no attempt, through article 16, to establish an obligation for States which were not parties to those conventions. Another member also questioned the reference to the multilateral conventions in force, since such wording was not contained in the Convention on the Privileges and Immunities of the United Nations or in the Convention on the Privileges and Immunities of the Specialized Agencies. He considered that a more appropriate reference would be to international law, particularly since, at present, there was still no multilateral convention on the diplomatic courier and the diplomatic bag which had been adopted at the worldwide level.

293. As to draft article 17 proposed by the Special Rapporteur, 367/ one member found it fully acceptable, whereas other members found that it was too

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366/ Draft article 16 as proposed by the Special Rapporteur read as follows:

> "Article 16
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> International organizations shall have the right to use codes and to dispatch and receive their official communications by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags under the provisions of the multilateral conventions in force governing matters relating to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

367/ Draft article 17 as proposed by the Special Rapporteur read as follows:

> "Article 17
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> None of the provisions of this chapter shall affect the right of each State party (to this Convention) to adopt the necessary precautions and appropriate measures in the interest of its security."

restrictive for the rights of the international organizations and that it was too much in favour of the interests of States. According to those members, the principle of the protection of the security of member States had to be offset in a more balanced provision against the principle that States must respect and promote the achievement of the objectives of international organizations. One member also pointed out that the corresponding provision of the Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies was more favourable in that regard to international organizations than draft article 17 proposed by the Special Rapporteur.

294. With regard to the Special Rapporteur's sixth report, some members referred generally to questions relating to the fiscal immunities and exemptions from Customs duties of international organizations, noting that the basic reason for the fiscal immunity of an organization lay in the principle that the host State should not derive unjustified benefit from the presence of an international organization on its territory. An additional reason was that the host State had to facilitate the accomplishment of the purposes of the organization. In that connection, some members cited Article 105 of the United Nations Charter and the 1946 and 1947 Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies, respectively, as very important sources. It was pointed out that exemptions of organizations from Customs duties were based on the principle that organizations had to enjoy some independence in order to pursue their objectives and exercise their functions. In that connection, emphasis was also placed on a need to distinguish between official and other uses in order to determine the limits to which such exemptions should be subject.

295. With specific reference to draft article 18 proposed by the Special Rapporteur, 368/ one member expressed his support and said that the

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368/ Draft article 18 as proposed by the Special Rapporteur read as follows:

"Article 18

International organizations, their assets, income and other property intended for their official activities shall be exempt from all direct taxes; it is understood, however, that international organizations will not claim exemptions from taxes which are, in fact, no more than payment for public utility services."

provision was an adaptation of the relevant provisions of the Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies. Another member drew attention to the fact that the words "direct" and "indirect", as they applied to a tax, should be defined either in the article or in another place in the draft. Another member said that he was in favour of the deletion of the last part of the article starting with the words "it is understood, however," and of drafting a new article relating to the obligation of international organizations to pay amounts relating to the use of public utility services.

296. In connection with draft article 19, 369/ one member pointed out that, unlike other articles, it was based on a similar provision of the Vienna Convention on Consular Relations. Another member asked what the difference was between the "public utility services" referred to in draft article 18 and "specific services rendered", as referred to in draft article 19, paragraph 1. If there was no difference, he said that the two provisions should be harmonized. Another member considered that draft article 19, paragraph 2, might not be necessary, since it referred not to activities of an organization, but to persons contracting with it.

369/ Draft article 19 as proposed by the Special Rapporteur read as follows:

"Article 19

1. International organizations shall be exempt from all national, regional or municipal dues and taxes on the premises of the organization, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the international organization."

297. With regard to draft article 20 proposed by the Special Rapporteur, 370/ one member said that there should be an additional paragraph, which could indicate which measures of control the host State could exercise in order to prevent possible abuses of exemptions. Another member suggested that the word "only" should be added after the words "for their official use" in order to highlight the functional nature of exemptions. However, that member had reservations about the words "in accordance with the laws and regulations promulgated by the host State" in the chapeau of the article, since he believed that they might give rise to abuses by Governments, which could, without consulting organizations, promulgate provisions that might considerably restrict the privileges accorded to those organizations. Another member was of the opinion that the provisions of article 20 (b), which related to publications, should be included in draft article 13 so that the question of publications could be dealt with in a single article.

370/ Draft article 20 as proposed by the Special Rapporteur read as follows:

"Article 20

International organizations, their assets, income and other property shall, in accordance with the laws and regulations promulgated by the host State, be exempt from:

(a) All kinds of Customs duties, taxes and related charges, other than charges for storage, cartage and similiar services, as well as from import and export prohibitions and restrictions with respect to articles imported or exported by international organizations for their official use; it is understood, however, that articles imported under such exemption may not be disposed of, whether or not in return for payment, in the country into which they have been imported, except under conditions agreed with the Government of that country;

(b) Customs duties and prohibitions and restrictions with respect to the import and export of their publications intended for official use."

298. In relation to draft article 21 proposed by the Special Rapporteur, 371/ several members expressed the view that the term "in principle" in paragraph 1 was not justified, since organizations either were or were not entitled to the tax exemption referred to in the paragraph. That term also had the disadvantage of giving States the possibility of interpreting it in various ways, in favour of some organizations and against others. One member also criticized the use in the paragraph of the word "claim", since it raised doubts as to whether organizations were or were not entitled to the tax exemption referred to in the paragraph. One member strongly criticized the paragraph for not clearly providing for a tax exemption in the case of the purchase or sale of immovable property by an organization. That member said that there was no reason why the host State should profit by the money which the other member States of the organization contributed to its budget. On the basis of that same principle, another member pointed out that the only justification for the payment of consumer taxes by an organization might be practical reasons relating to the difficulties involved in determining the amount of the exemption in each case. Such problems tended to disappear in the case of large purchases or purchases in large quantities and that was why paragraph 2 of the draft article was justified. In that connection, one member said that he preferred the use of the word "major" in connection with the purchases referred to in paragraph 2 and that it had been used in some language versions of the paragraph instead of the word "large" in the English text.

371/ Draft article 21 as proposed by the Special Rapporteur read as follows:

"*Article 21*

1. International organizations shall not, in principle, claim exemption from consumer taxes or sales taxes on movable and immovable property that are incorporated in the price to be paid.

2. Notwithstanding the provisions of the foregoing paragraph, when international organizations make, for their official use, large purchases of goods on which such duties and taxes have been, or may be, imposed, States parties (to the present Convention) shall, wherever possible, adopt the necessary administrative provisions for the remission or refund of the amount corresponding to such duties or taxes."

299. In connection with draft article 22 proposed by the Special Rapporteur, 372/ which defined the terms "official activity" or "official use" used in a number of draft articles, several members expressed the view that such a definition was necessary for the draft as a whole, since it established the functional criterion on which the draft should be based. It should therefore be included in a more general provision, in another place in the draft, so that it would apply to all of the provisions on the topic. One member stressed that the draft article should clearly state the general principle that all the privileges and immunities enjoyed by international organizations were granted to them in connection with their official activities as thus defined.

300. The Special Rapporteur referred to some of the specific comments made during the discussion. With regard to the suggestion that the draft articles should also deal with respect for and the protection of the emblem, name and, in some cases, flag of an organization, he said that his intention was to deal with the subject at the end of the draft articles. He did not think that that question was necessarily linked to the protection of archives and he had doubts whether all international organizations required such additional protection. The question nevertheless warranted consideration. Referring to the suggestion that draft article 14 should also deal with relatively new areas in respect of communications, such as satellite telecommunications, he said that he took note of the comment, even though it was also clear that the draft article was already broad enough to cover those areas, since it referred generically to "other communications". Although he had some reservations about the use of the words "in principle" in draft article 21, paragraph 1, he had included them in the text because they were in conformity with current

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372/ Draft article 22 as proposed by the Special Rapporteur read as follows:

"Article 22

For the purposes of the foregoing articles, the terms "official activity" or "official use" shall mean those relating to the accomplishment of the purposes of the international organizations."

practice and were to be found, inter alia, in article II, section 8, of the Convention on the Privileges and Immunities of the United Nations and in article III, section 10, of the Convention on the Privileges and Immunities of the Specialized Agencies.

301. The Special Rapporteur added that he had duly taken note of all the other useful comments made during the discussion and that the Drafting Committee would be responsible for including them in texts on which the Commission could generally agree.

CHAPTER VII

STATE RESPONSIBILITY

A. Introduction

302. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (mise en oeuvre) of international responsibility. [373]

303. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". [374]

304. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles on "the content, forms and degrees of international responsibility".

305. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from the Special Rapporteur, Mr. Willem Riphagen, [375] with reference to Parts Two and Three of the draft articles. The seventh report contained a section (which was neither

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[373] Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

[374] Yearbook ... 1980, vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

[375] For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397; and Add.1.

introduced nor discussed at the Commission) on preparation of the second reading of Part One of the draft articles, concerning the written comments of Governments on 10 of the draft articles of Part One.

306. As of the conclusion of its thirty-eighth session in 1986, the Commission had provisionally adopted draft articles 1 to 5 of Part Two. [376] Draft

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[376] The draft articles of Part Two provisionally adopted so far by the Commission are:

"Article 1

> The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

"Article 2

> Without prejudice to the provisions of articles 4 and [12], the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

"Article 3

> Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

"Article 4

> The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

"Article 5

> 1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.
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> 2. In particular, "injured State" means
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> (a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

articles 6 to 16 of Part Two 377/ and draft articles 1 to 5 of Part Three 378/ and its Annex had been referred to the Drafting Committee. 379/

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms.

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States."

377/ For the text of draft articles 6 to 16 of Part Two, see Yearbook ... 1985, vol. II (Part Two), p. 20, note 66. These articles were referred to the Drafting Committee at that session, see ibid., para. 162.

378/ For the text of draft articles 1 to 5 of Part Three and its Annex, see Yearbook ... 1986, vol. II (Part Two), p. 35, note 86.

379/ The five articles of Part Three and its Annex were referred to the Drafting Committee at the thirty-eighth session in 1986, see ibid., para. 63.

307. The Commission, at its thirty-ninth session in 1987, appointed Mr. Gaetano Arangio-Ruiz, Special Rapporteur for the topic of State responsibility. 380/ The Commission received two reports from the Special Rapporteur from 1988 to 1990. 381/ At its forty-first and forty-second sessions in 1989 and 1990, the Commission referred to the Drafting Committee draft articles 6, 7, 8, 9 and 10 of Chapter Two (Legal consequences deriving from an international delict) of Part Two of the draft articles. 382/

B. Consideration of the topic at the present session

308. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/440 and Add.1). Due to lack of time, however, the Commission was unable to consider the topic at the present session. It nevertheless deemed it advisable for the Special Rapporteur to introduce his report, in order to expedite work on the topic at its next session.

309. The Special Rapporteur introduced his third report at the Commission's 2238th meeting. Since the report has not yet been considered by the Commission, the following paragraphs are only for informative purposes.

310. The third report of the Special Rapporteur dealt with the "instrumental" consequences of an internationally wrongful act or "countermeasures", namely with the legal regime of the measures that an injured State may take against a State which committed an internationally wrongful act, notably, in principle, with the measures applicable in the case of delicts. The Special Rapporteur

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380/ *Yearbook ... 1987*, vol. II (Part Two), para. 220.

381/ Document A/CN.4/416 and Corr.1 (English only), Corr.2 and A/CN.4/416/Add.1 and Corr.1 (English only), Corr. 2 and Corr.3 (Spanish only); document A/CN.4/425 and Corr.1 (English only) and A/CN.4/425/Add.1 and Corr.1 (English only).

382/ For the text of the articles 6 and 7, see Report of the International Law Commission on the work of its forty-first session (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10)), pp. 191-193, paras. 229 and 230, and for articles 8, 9 and 10 see Report of the International Law Commission on the work of its forty-second session (*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10* (A/45/10)), notes 247, 262 and 263.

indicated that the main purpose of the third report was to identify problems, opinions and alternatives; and to elicit comments and criticism within the Commission and elsewhere on the basis of which more considerate proposals could be submitted.

311. The Special Rapporteur noted that the legal regime of countermeasures, which constituted the core of Part Two of State responsibility, was one of the most difficult subjects of the whole topic. He pointed out that whereas with regard to the substantive consequences of a wrongful act one could draw from domestic law analogies to deal with similar problems arising on the international plane, domestic law could not provide any assistance with respect to countermeasures. The other difficulty with the study of countermeasures was the absence, in the international community, of any institutionalized remedies to be put into motion against a State which committed an international *delict*. Consequently the injured States were bound to rely mainly, in so far as general international law was concerned, upon their own unilateral reactions: and in that respect the International Law Commission had to take the greatest care, in devising the conditions of lawful resort to such actions, to ensure that the factual inequalities among States do not unduly operate to the advantage of the strong and rich over the weak and needy.

312. The third report began with a methodological chapter reviewing the terms as they were used in literature as well as in practice. Those terms included self-defence, sanctions, retortions, reprisals, countermeasures, reciprocity and suspension and termination of treaties. The operative part of the report then dealt with a more detailed account of conditions and limits within which an injured State may lawfully take countermeasures, the relationship of countermeasures under general international law with the so-called "self-contained" regimes, the identification of the injured State or States entitled to resort to measures and finally the substantive restrictions on countermeasures such as the prohibition of force, respect for human rights, inviolability of protected persons and relevance of *jus cogens* and *erga omnes* obligations.

313. The Special Rapporteur noted that views varied as to whether lawful reprisals may only be taken if a wrongful act had in fact been committed. Some held the view that a wrongful act must in fact have been committed, while

others felt that the bona fide belief that such an act had been committed would be sufficient. As far as this topic was concerned, he noted that the matter had already been settled by Part One which presupposes the existence of a prior unlawful act. As regards the purpose of those measures, he referred to the diverse views of scholars: those who viewed internationally wrongful acts primarily as "civil" torts were inclined to see the function of countermeasures as merely restitutive or compensatory; while those who viewed wrongful acts within a predominantly "penal" nature tended to assign to countermeasures a retributive function. In his view, measures performed a dual function of a compensatory as well as a retributive nature, one or the other function prevailing according to the case.

314. He noted also that the relevance of the aim actually pursued by an injured State in taking countermeasures varied according to the nature of the wrongful act, the scope of the injury and the attitude of the wrongdoer State. The regime of countermeasures should take account of the distinction between measures aimed at ensuring interim protection or at inducing acceptance of a dispute settlement procedure or at least securing a diplomatic dialogue, on the one hand, and those intending to force cessation of the wrongful act and to secure reparation, on the other hand. In the view of the Special Rapporteur, the measure in which the legal regime of countermeasures should be diversified according to functions or aims should further be studied in the light of State practice. He was inclined to support diversification, particularly with regard to the impact of prior claim to reparation, sommation, compliance with dispute settlement obligations and proportionality.

315. The other question raised in the report was the extent to which lawful resort to reprisals should be preceded by intimations such as protest, demand of cessation and reparation, etc. The Special Rapporteur noted that views in literature differed. According to a minority view no demand of cessation or reparation would need to be addressed as a matter of law to the offending State before reprisals were resorted to. A different position was taken by the classical theory of State responsibility by which reparation and cessation were seen as the principal consequences of an internationally wrongful act while reprisals were seen essentially, although not exclusively, as coercive means to obtain cessation or reparation. Under this theory it was natural to

assume that acts of reprisals could not, as a rule, be lawfully resorted to prior to an unsuccessful protest and demand for cessation and reparation. The Special Rapporteur noted that the essence of the latter position was also maintained by that part of the doctrine according to which the consequences of an internationally wrongful act were not merely restitutive, compensatory or reparatory but retributive or punitive as well. Those authors also shared the view that whatever their function, reprisals could not lawfully be resorted to unless cessation/reparation had been demanded in vain. The Special Rapporteur noted, however, that exceptions were envisaged by authors. For example, some believed that an aggrieved State could lawfully resort to reprisals without any preliminaries in case of dolus on the part of the lawbreaking State. In the view of the Special Rapporteur the matter should be explored in greater depth in the light of State practice in order to see whether mere codification of existing trends would suffice or whether the Commission should proceed to some measure of progressive development in the area.

316. Other issues were mentioned as relevant to determining the lawfulness of countermeasures, such as the more or less "bland" or "vigorous" nature of countermeasures, the protective aims pursued thereby, the degrees of urgency of the remedy, etc. Interrelated with the requirement of a prior demand of reparation, was the question of the impact of any existing obligations of the injured State with regard to dispute settlement procedures. The question could be posed as follows: whether under Charter Article 2, paragraph 3 and the provisions of Article 33 no measures should be resorted to by an injured State before resorting to one or more of the means listed in the latter rule; whether there were any measures an injured State would or should be entitled to resort to, for example, interim measures or measures intended to induce the counterpart to comply with any settlement obligations without waiting for an unsuccessful attempt to use any means of settlement; - whether and under what conditions, in particular, the fact that a settlement or quasi-settlement procedure had attained a given stage of progress would restrict the faculté of resort to given measures.

317. The very crucial problem of proportionality between the measures and the wrongful act was another issue on which the Special Rapporteur found no

uniformity either in State practice or in doctrine. He was inclined to prefer stricter formulations of the requirement of proportionality than those emerging from some cases and from the draft article proposed in 1985.

318. The Special Rapporteur explained that another difficult question was whether the regime of countermeasures should undergo any adaptations in respect of suspension and termination of treaties. A number of issues should be studied in that context, such issues to be settled, however, exclusively on the basis of the exigencies of the topic - namely of the regime of the consequences of internationally wrongful acts - and without confusing that regime with the rules of general international law on the law of treaties, including article 60 of the Vienna Convention. An inapplicable provision, for example, was that part of the said article 60 which envisaged suspension and termination for only material breaches of a treaty. The distinction between bilateral and multilateral treaties was also among the essential points to be examined. Additional problems arose in the presence of the so-called "self-contained" treaty regimes, such as the treaties establishing the European Community, human rights treaties, etc. He was inclined to believe that, as a matter of principle, the general regime of countermeasures should be applicable as a safeguard even in cases covered by one of the so-called "self-contained" treaty regimes. Much would depend in that respect upon the nature of the wrongful act, the effectiveness of the "self-contained" regime, etc.

319. Another issue to be addressed was the identification of the injured State or States entitled to take countermeasures. The Special Rapporteur noted that although the matter had initially been raised in respect of article 19 on international crimes and of violations of obligations erga omnes (where one faced a multitude of injured States) it had soon been understood that the problem arose also with regard to delicts. Furthermore, the question arose not just with regard to countermeasures but also with regard to the substantive consequences, namely cessation, reparation, satisfaction and guarantees of non-repetition. He believed, however, that it would perhaps not be correct to envisage one or more general rules applicable to the special position of the so-called "non-directly" or "less directly" injured States with regard to the consequences of internationally wrongful acts. Such

special position could not be determined in a general way. It could only be determined in concreto, in each particular case on the basis of the nature and circumstances of the case itself, on the one hand, and - on the other hand - of the application of the general rules governing title and conditions of claim to reparation and of lawfulness of countermeasures (proportionality, prior demand, prior experiment of dispute settlement procedures, etc.) Indeed, the uniqueness of the position of so-called "indirectly" injured States was probably only a matter of degree with regard to both reparation and countermeasures.

320. Other most important and difficult issues to be addressed in the context of countermeasures were the restrictions of the means injured State or States may lawfully use as countermeasures. The Special Rapporteur referred to them as "substantive limitations" or "restrictions" issues and treated them under the headings of: - prohibition of use of force; - respect for human rights; - inviolability of specially protected persons; - and compliance with peremptory rules and erga omnes obligations.

321. The Special Rapporteur found support, in the prevailing view in literature as well as in the authoritative pronouncements of international political and judicial bodies, for the condemnation of any forms of armed countermeasures. Together with the whole content of Article 2, paragraph 4 of the Charter, that prohibition would have become, according to the said prevailing view, a part of general, unwritten international law. In his view, one should not close one's eyes, however, to the persistence of practices and doctrines which would admit exceptions endangering the effectiveness of the prohibition. Views varied as to whether economic coercion was unlawful. According to many, economic coercion was not covered by Article 2, paragraph 4 of the Charter and could therefore only be condemned as part of a distinct rule prohibiting intervention. The Special Rapporteur believed that in any case some extreme forms of economic measures might be covered by the prohibition of force.

322. Respect for human rights was, according to the Special Rapporteur, another substantive limitation on countermeasures. This included respect for fundamental humanitarian principles in general. Other substantive restrictions of faculté to resort to countermeasures was mentioned by the Special Rapporteur to be the inviolability of specially protected persons.

He referred to various views as to the reasons for excluding reprisals against diplomatic envoys as well as the views according to which distinctions should be made between the types of protection such envoys enjoyed, some of which could be restricted by way of reprisal. The last substantive limitation mentioned by the Special Rapporteur was represented by *jus cogens* and *erga omnes* obligations. Reprisals could not violate peremptory norms; a proposition which was implied in article 30 (countermeasures in respect of an internationally wrongful act) of Part One.

CHAPTER VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

323. The Commission noted that in paragraph 4 of its resolution 45/41, the General Assembly had requested the International Law Commission:

(a) To consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute, *inter alia*, to a more effective consideration of its report in the Sixth Committee;

(b) To pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

324. The Commission decided that these requests should be taken up under item 9 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation".

325. The Planning Group of the Enlarged Bureau was composed as indicated in paragraph 4 above. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

326. The Planning Group held six meetings between 25 June and 10 July 1991. It had before it the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fifth session entitled "Programme, procedures and working methods of the Commission" (A/CN.4/L.456, paras. 471-500). It also had before it a number of proposals submitted by members of the Commission.

327. The Enlarged Bureau considered the report of the Planning Group at its 2nd meeting on 5 July 1991. At its 2251st and 2252nd meetings, on 19 July 1991, the Commission adopted the following paragraphs on the basis of recommendations of the Enlarged Bureau resulting from the discussions in the Planning Group.

Long-term programme of work

328. Pursuant to paragraph 544 of the report of the Commission on the work of its forty-second session, the Working Group established at the forty-first session to consider the Commission's long-term programme of

work 383/ concluded the examination of questions within its mandate and submitted its report to the Planning Group. 384/

329. The Planning Group and later the Commission took note of the report and of the recommendations which it contained.

330. On the basis of the report, the Commission drew up the following list of topics from which it intends to select topics for inclusion in its long-term programme of work:

(a) the law of confined international ground waters

(b) extraterritorial application of national legislation

(c) the law concerning international migrations

(d) extradition and judicial assistance

(e) the legal effects of resolutions of the United Nations

(f) international legal regulations of foreign indebtedness

(g) the legal conditions of capital investment and agreements pertaining thereto

(h) institutional arrangements concerning trade in commodities

(i) legal aspects of the protection of the environment of areas not subject to national jurisdiction (global commons)

(j) rights of national minorities

(k) international commissions of inquiry (fact-finding)

(l) the legal aspects of disarmament.

Drafting Committee

331. Further to the request contained in paragraph 11 of General Assembly resolution 45/41, the Commission wishes to indicate that, in accordance with the decision it took during its forty-second session, 385/ it organized the work of its forty-third session so as to allow for two weeks of concentrated work in the Drafting Committee at the beginning of the session in order to reach the goals which it had set for itself for the current quinquennium.

383/ The Working Group was composed of Mr. Díaz-González (Chairman), Mr. Al-Khasawneh, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat.

384/ See Annex.

385/ *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), para. 548.*

332. During those two weeks, from 30 April to 10 May, the Drafting Committee held 13 meetings. Due to concentrated effort, the Committee was able during those meetings to complete its second reading of the topic "Jurisdictional immunities of States and their property". It devoted also three of those meetings to formulation of new articles on the topic "Draft code of crimes against the peace and security of mankind".

333. All the members of the Commission present in Geneva during the first two weeks of May took part in the meetings of the Drafting Committee.

Other questions discussed in the Planning Group

334. The Commission suggests that advantage be taken, whenever it is felt necessary, of the possibilities offered by article 16 (d) of the Statute. [386]

335. The Commission considers that, as envisaged in article 16 (e) of its Statute, it should endeavour to coordinate its work with other United Nations institutions, regional organizations and scientific centres involved with subjects on its current programme of work. Such coordination can take several forms, including exchange of documentation on relevant subjects, solicitation of comments from such United Nations institutions on matters within their competence and, when necessary and within the limits of the budget, mutual representation in ongoing deliberations on related topics.

336. The Commission is of the view that in order to facilitate the consideration of its report and the codification and progressive development of international law, it should devote time during the first year of the next term of office of its members to the consideration of the preparation of its report.

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[386] Reading as follows:

> "When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow in general a procedure on the following lines:
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> ...
>
> (d) It may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire;
>
> ..."

337. The Commission took note with interest of the information provided by the Legal Counsel, in his statement of 25 June 1991, on the efforts being made to computerize the United Nations Treaty Series. The computerized data base which is being developed will no doubt be very helpful to the Commission in the discharge of its task.

Duration of the next session

338. The Commission wishes to reiterate its view that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of the session be maintained. The Commission also wishes to emphasize that it made full use of the time and services made available to it during its current session.

Other matters

339. The Commission considered the issues raised in paragraph 546 of the report on the work of its forty-second session on the possibility of splitting the session of the Commission in two parts. However, since this proposal had not been considered in detail in the Planning Group, it was agreed that, during the next session of the Commission, the issue would be discussed and, if necessary, a study would be requested from the Secretariat on the administrative and financial implications of the matter.

B. Cooperation with other bodies

340. The Commission was represented at the April 1991 session of the Asian-African Legal Consultative Committee, in Cairo, by Mr. Jiuyong Shi as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Frank Njenga. Mr. Njenga addressed the Commission at its 2233rd meeting on 2 July 1991 and his statement is recorded in the summary record of that meeting.

341. The Commission was represented at the 1990 session of the Inter-American Juridical Committee, in Rio de Janeiro, by Mr. Carlos Calero-Rodrigues who attended the session as observer on behalf of the Commission.

342. The Commission was represented at the November 1990 session of the European Committee on Legal Co-operation, in Strasbourg, by Mr. Pellet who attended the session as observer for the Commission and addressed the

Committee on behalf of the Commission. The European Committee on Legal Co-operation was represented at the present session of the Commission by Ms. Margaret Killerby. Ms. Killerby addressed the Commission at its 2237th meeting on 9 July 1991 and her statement is recorded in the summary record of that meeting.

C. Other cooperation activites related to the work of the Commission

343. A group of members of the Commission as well as other scholars in international law participated in a Seminar on the draft Code of crimes against the peace and security of mankind and the establishment of an international criminal jurisdiction. The Seminar was arranged on 18 to 20 May 1991 in Talloires (France) by the Foundation for the Establishment of an International Criminal Court and International Criminal Law Commission.

344. Some members of the Commission as well as other legal experts on disarmament participated in the meetings of the Committee on Arms Control and Disarmament Law of the International Law Association held in Geneva on 7 and 8 July 1991.

D. Date and place of the forty-fourth session

345. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 4 May 1992 and conclude on 24 July 1992.

E. Representation at the forty-sixth session of the General Assembly

346. The Commission decided that it should be represented at the forty-sixth session of the General Assembly by its Chairman, Mr. Abdul G. Koroma. 387/

F. International Law Seminar

347. Pursuant to General Assembly resolution 45/41, the United Nations Office at Geneva organized, during the current session of the Commission, the twenty-seventh session of the International Law Seminar which, following a decision adopted by the Commission at its forty-second session, has been

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387/ At its 2252nd meeting on 19 July 1991, the Commission requested Mr. Julio Barboza, Special Rapporteur for international liability for injurious consequences arising out of acts not prohibited by international law, to attend the forty-sixth session of the General Assembly during the discussion of his topic.

dedicated to the memory of Paul Reuter and entitled "Paul Reuter Session". The Seminar is intended for post-graduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

348. A Selection Committee under the chairmanship of Professor Christian Dominicé (The Graduate Institute, Geneva) met on 14 March 1991 and, after having considered some 80 applications for participation in the Seminar, selected 24 candidates of different nationalities mostly from developing countries. Twenty of the selected candidates, as well as five UNITAR fellowship holders, were able to participate in this session of the Seminar. 388/

349. The session of the Seminar was held at the Palais des Nations from 3 to 21 June 1991 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. It was opened, in the absence of the Commission's Chairman, by its First Vice-Chairman, Mr. John Alan Beesley. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission and lectures specifically organized for them.

350. Several lectures were dedicated, during the Paul Reuter Session, to the memory of that great jurist and former member of the Commission, attempting to reflect his manifold activities in the field of international law. The following lectures were given in that respect by members of the Commission:

388/ The list of participants in the twenty-seventh session of the International Law Seminar is as follows: Mr. Farouk Al-Attar (Syrian Arab Republic) (UNITAR fellowship holder); Mr. Mohamed Bentaja (Morocco); Mr. Banuera Berina (Kiribati); Ms. Claire Bury (United Kingdom); Ms. Miryam Bustos Sanchez (Colombia); Mr. Miguel Celi Vegas (Peru); Ms. Esther Chibanda (Zimbabwe) (UNITAR fellowship holder); Ms. Vesna Crnic-Grotic (Yugoslavia); Mr. Thana Duangratana (Thailand); Mr. John Ejoku Opolot (Uganda); Ms. Celia Feria (Philippines); Ms. Carmen Gonzalez Pedrouzo (Uruguay) (UNITAR fellowship holder); Ms. Birgit Kofler (Austria); Mr. Malila Mumba (Zambia); Ms. Phoebe Okowa-Bennun (Kenya); Mr. Jorge Rocha Aramburo (Bolivia); Mr. George Sarpong (Ghana); Ms. Sumitra Sripada (India); Mr. Kari Takamaa (Finland); Mr. Feleti Teo (Tuvalu); Mr. José Thompson (Costa Rica); Mr. Paul Tiendrebeogo (Burkina Faso); Mr. Puntsagiin Tsagaan (Mongolian People's Republic) (UNITAR fellowship holder); Ms. Mary-Lois Vilakazi (Swaziland) (UNITAR fellowship holder); Mr. Marc Weller (Germany).

Mr. Awn Al-Khasawneh: "The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations"; Mr. Alain Pellet: "Morality and Law in International Relations (Paul Reuter, a 'Moral' Approach to International Law)"; Mr. Emmanuel Roucounas: "Juridical Relations between International Organizations, their Member States and Third Parties in the Work of Paul Reuter"; Mr. Christian Tomuschat: "The Contribution of Paul Reuter to the Creation of the European Community of Steel and Coal - The First Step towards European Integration". One lecture was given by Professor Jean-Pierre Quéneudec, member of the International Narcotics Control Board, on: "The Contribution of Paul Reuter to the Work of the International Narcotics Control Board".

351. Several lectures were also given by members of the Commission on other topics, namely: Mr. Andreas Jacovides: "The Role of International Law in Contemporary Diplomacy"; Mr. Ahmed Mahiou: "Presentation of the International Law Commission and its Work"; Mr. Stephen McCaffrey: "The Law of the Non-Navigational Uses of International Watercourses"; Mr. Luis Solari Tudela: "Draft Code of Crimes against the Peace and Security of Mankind"; Mr. Doudou Thiam: "Problems of the Creation of an International Penal Jurisdiction".

352. In addition, lectures were given by staff of the United Nations Centre for Human Rights and of the Legal Division of the International Committee of the Red Cross, as follows: Mr. Gudmundur Alfredsson: "The Human Rights Programme of the United Nations" and Ms. Louise Doswald-Beck: "International Humanitarian Law and Public International Law".

353. As it has become a tradition for the Seminar, the participants enjoyed the hospitality of the Republic and Canton of Geneva. On that occasion they were addressed by Mr. E. Bollinger, Chief of Information of the Canton, and Mr. J.-J. Rosé, Chief, Legislation and Official Publications Service, who gave a talk on the political and constitutional system of Switzerland.

354. At the end of the session of the Seminar, Mr. Abdul G. Koroma, Chairman of the International Law Commission, and Mr. Liviu Bota, representing the Director General of the United Nations Office at Geneva, addressed the participants. In the course of this brief ceremony, each of the participants was presented with a certificate attesting to his or her participation in the twenty-seventh session of the Seminar.

355. The Seminar is funded by voluntary contributions from Member States and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Austria, Denmark, Finland, Germany, Ireland, Morocco, Sweden, Switzerland and the United Kingdom had made fellowships available in particular to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 13 participants and partial fellowship (subsistence only) could be given to one participant. Thus of the 596 participants, representing 146 nationalities, who have taken part in the Seminar since its inception in 1964, fellowships have been awarded to 308.

356. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission notes with satisfaction that in 1991 all candidates who had applied for financial assistance could be awarded fellowships. As all the available funds are thus almost exhausted, the Commission recommends that the General Assembly should again appeal to States which can do so to make the voluntary contributions that are needed for the holding of the Seminar in 1992 with as broad a participation as possible.

357. The Commission noted with satisfaction that in 1991 full interpretation services had been made available to the Seminar and it expressed the hope that every effort would be made to continue to provide the Seminar at future sessions with the same level of services and facilities despite existing financial constraints.

G. Gilberto Amado Memorial Lecture

358. With a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the International Law Commission, it was decided in 1971 that a memorial should take the form of a lecture to which the

members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

359. The Gilberto Amado Memorial Lectures have been made possible through generous contributions from the Government of Brazil. Early in its present session, the Commission established an informal consultative committee, composed of Mr. Carlos Calero-Rodrigues, Chairman, Mr. Francis M. Hayes, Mr. Andreas Jacovides, Mr. Abdul G. Koroma and Mr. Alexander Yankov, to advise on necessary arrangements for the holding of a Gilberto Amado Memorial Lecture in 1991. The eleventh Gilberto Amado Memorial Lecture was preceded by a Gilberto Amado dinner which took place during the twenty-seventh session of the International Law Seminar, on 6 June 1991. The lecture, which was delivered on 2 July 1991 by Mr. Francisco Rezek, Minister of External Relations of Brazil, was on "International Law, Diplomacy and the United Nations at the End of the Twentieth Century". The Commission hopes that, as previously, the text of the lecture will be printed in English and French and thus made available to the largest possible number of specialists in the field of international law.

360. The Commission expressed its gratitude to the Government of Brazil for its generous contribution which enabled the Gilberto Amado Memorial Lecture to be held in 1991. The Commission requested its Chairman to convey its gratitude to the Government of Brazil.

ANNEX

REPORT OF THE WORKING GROUP ON LONG-TERM PROGRAMME OF WORK TO THE PLANNING GROUP

1. Pursuant to paragraph 544 of the Commission's report to the forty-fifth session of the General Assembly, the Working Group on Long-Term Programme of Work met on 12, 19, 20, and 27 June as well as 4 July 1991 in order to consider questions within its mandate.

2. At the conclusion of its deliberations, the Working Group decided to recommend to the Planning Group the inclusion of the attached paragraphs in the Commission's report to the General Assembly of its present session.

> "1. Pursuant to paragraph 544 of the Commission's report to the forty-fifth session of the General Assembly, the Working Group on Long-Term Programme of Work a/ held further meetings with a view to formulating appropriate recommendations on the questions within its mandate (doc. A/45/10, note 325, para. 9).
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> 2. In the course of its deliberations, the Working Group bore particularly in mind: (a) article 18 of the statute of the International Law Commission; (b) preambular paragraphs 4 and 5 and operative paragraph 4 of General Assembly resolution 45/41 of 28 November 1990 on the report of the International Law Commission on the work of its forty-second session; (c) operative paragraph 4 of General Assembly resolution 45/40 of 28 November 1990 on the United Nations Decade of International Law as well as paragraphs I (2 and 3), III (1) and V (3) of its Annex on the Programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law; (d) the Working Group progress report included in the report of the International Law Commission to the forty-fifth session of the General Assembly (doc. A/45/10, footnote 325); (e) the views expressed by members of the Sixth Committee on that progress report as reflected in the topical summary prepared by the Secretariat (A/CN.4/L.456, paras. 481 to 487); (f) the views expressed by Member States and international

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a/ The Working Group was composed as follows: Mr. Diaz-González (Chairman), Mr. Al-Khasawneh, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat.

organizations on the 'United Nations Decade of International Law' and in particular on 'the encouragement of the progressive development of international law and its codification', as reflected in the report of the Secretary-General (A/45/430)."

3. The Working Group reviewed the significant role that the International Law Commission had played in the course of the past 45 years in the codification and progressive development of international law and in transforming the classical rules of customary international law into an order of highly systematized norms. The Group concluded that, notwithstanding the substantive headway already achieved in this field, the complexity and variety of the international reality as well as its constant evolution and progress continued to pose challenges which required an international legal response.

4. In this connection, the Working Group was of the view that the International Law Commission, as the main organ created by the General Assembly for the codification and progressive development of international law under article 13 (1) (a) of the United Nations Charter, was particularly suited to meet that challenge and thus to make also a substantive contribution to the objectives of the United Nations Decade of International Law.

5. The Working Group considered that there were several ways in which this contribution by the Commission to the Decade could be achieved. The first one was finalization of the work on the topics presently on its agenda. In this connection, and with particular reference to the topic "Draft code of crimes against the peace and security of mankind", the Working Group considered that a particularly appropriate contribution to the basic purposes of the Decade and the strengthening of the rule of law in international relations would be the preparation by the Commission of a draft statute for an international criminal court, if the General Assembly so decided.

6. Furthermore, the attainment of the goals mentioned in the paragraph above would necessarily lead to a gradual reduction of topics on the Commission's agenda, and to the need to identify new topics for inclusion in the Commission's programme of work for coming years. The Working Group felt that, in making its proposals on new topics to the General Assembly, the Commission should bear particularly in mind the objectives of the Decade and the convenience of ensuring the maximum effectiveness in the Commission's contribution to it.

7. In this connection, the Working Group was of the view that the new topics envisaged should respond to the most pressing needs of the international community and that most of them had to be of a predominantly practical rather than theoretical nature. Most of them should also be susceptible to completion in a few years time, possibly within the Commission's next term, or during the remainder of the Decade, without prejudice to a very reduced number of other very relevant topics which might entail a longer process for its codification and progressive development.

8. In view of the considerations set out in the preceding paragraphs, the Working Group proposed that the Commission should recommend to the General Assembly the inclusion in the Commission's long-term programme of work of the topics listed below. The topics have been grouped under five headings but no specific priority has been intended by the order in which these headings, or the topics under each heading, are presented.

LIST OF TOPICS

International economic law

- International legal regulation of foreign indebtedness
- The legal conditions of capital investment and agreements pertaining thereto

Legal aspects of the protection of the environment

- Legal aspects of the protection of the environment of areas not subject to a national jurisdiction (global commons)
- The law of confined international groundwaters

The legal effects of resolutions of the United Nations

Extraterritorial application of national legislation

Other legal matters

- The law concerning international migrations
- Rights of national minorities
- Extradition and judicial assistance
- International commissions of inquiry (fact-finding)

كيفية الحصول على منشورات الأمم المتحدة

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